DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-193
Title: Susan B. Anthony List, et al., Petitioners
v.
Steven Driehaus, et al.
Docketed: August 13, 2013
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (11-3894, 11-3925)
Decision Date: May 13, 2013
Rehearing Denied: June 26, 2013
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 9 2013	Petition for a writ of certiorari filed. (Response due September 12, 2013)
Aug 21 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents John Mroczkowski, et al..
Sep 6 2013	Waiver of right of respondent Steven Driehaus to respond filed.
Sep 11 2013	Waiver of right of respondents Ohio Elections Commission, Charles Calvert, Bryan Felmet, John Mroczkowski, Harvey Shapiro, Jayme Smoot, Degee Wilhelm, Larry Wolpert, Philip Richter, Jon Husted to respond filed.
Sep 12 2013	Brief amici curiae of Institute for Justice, et al. filed.
Sep 12 2013	Brief amici curiae of 1851 Center for Consititution Law, et al. filed.
Sep 25 2013	DISTRIBUTED for Conference of October 11, 2013.
Sep 26 2013	Response Requested . (Due October 28, 2013)
Oct 7 2013	Order extending time to file response to petition to and including November 27, 2013, for all respondents.
Nov 13 2013	Letter of November 5, 2013, from counsel for Steven Driehaus received.
Nov 27 2013	Brief of State Respondents in opposition filed.
Dec 11 2013	DISTRIBUTED for Conference of January 10, 2014.
Dec 11 2013	Reply of petitioners Susan B. Anthony List, et al. filed. (Distributed)
Jan 10 2014	Petition GRANTED.
Feb 11 2014	SET FOR ARGUMENT ON Tuesday, April 22, 2014
Feb 12 2014	Record received from U.S.C.A. 6th Circuit is electronic (Not on PACER).
Feb 12 2014	Record received from U.S.D.C. Southern District of Ohio Western Division at Cincinnati is electronic and located on PACER.
Feb 19 2014	Consent to the filing of amicus curiae briefs, in support of either party or of

	neither party, received from counsel for the petitioners.
Feb 19 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party , received from counsel for the State Respondents.
Feb 24 2014	Joint appendix filed. (Statement of costs filed.)
Feb 24 2014	Brief of petitioners Susan B. Anthony List, et al. filed.
Feb 24 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent Steven Driehaus, et al.
Feb 28 2014	Brief amici curiae of Institute for Justice, et al. filed.
Feb 28 2014	Brief amici curiae of Cato Institute, and P.J. O'Rourke filed.
Feb 28 2014	Brief amici curiae of American Civil Liberties Union, et al. filed.
Feb 28 2014	Brief amicus curiae of Bioethics Defense Fund filed.
Feb 28 2014	Brief amicus curiae of Southeastern Legal Foundation filed.
Feb 28 2014	Brief amici curiae of American Booksellers Association, et al. filed.
Mar 3 2014	Brief amicus curiae of the United States filed.
Mar 3 2014	Brief amicus curiae of Alliance Defending Freedom filed.
Mar 3 2014	Brief amicus curiae of Ohio Attorney General Michael DeWine in support of neither party filed.
Mar 3 2014	Brief amicus curiae of Center for Competitive Politics filed.
Mar 3 2014	Brief amicus curiae of Student Press Law Center filed.
Mar 3 2014	Brief amici curiae of Christian Legal Society, et al. filed.
Mar 3 2014	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Mar 3 2014	Brief amicus curiae of Foundation for Incividual Rights in Education filed.
Mar 3 2014	Brief amici curiae of General Conference of Seventh-Day Adventists, et al. filed.
Mar 3 2014	Brief amici curiae of Citizens United, et al. filed.
Mar 3 2014	Brief amicus curiae of 1851 Center for Consititutional Law filed.
Mar 3 2014	Brief amicus curiae of First Amendment Lawyers Association filed.
Mar 3 2014	Brief amicus curiae of Republican National Committee filed.
Mar 3 2014	Brief amicus curiae of The Government Integrity Fund filed.
Mar 3 2014	Brief amicus curiae of Justice and Freedom Fund filed.
Mar 10 2014	CIRCULATED.
Mar 10 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 26 2014	Brief of respondents State Respondents filed. (Distributed)
Apr 9 2014	Reply of petitioners Susan B. Anthony List, et al. filed. (Distributed)
Apr 18 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 22 2014	Argued. For petitioners: Michael A. Carvin, Washington, D. C. For the United States, as amicus curiae: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Eric E. Murphy, State Solicitor, Columbus, Ohio.
Jun 16 2014	Judgment REVERSED and case REMANDED. Thomas, J., delivered the opinion for a unanimous Court.
Jul 18 2014	JUDGMENT ISSUED

PETITION FOR WRIT OF CERTIORARI

13-193

No. 13-___

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID R. LANGDON
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan Street
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

CHRISTOPHER P. FINNEY
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Ave.
Cincinnati, OH 45208

Counsel for Petitioners

QUESTIONS PRESENTED

I. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would *certainly* and *successfully* prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

II. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants below, are Susan B. Anthony List ("SBA") and the Coalition Opposed to Additional Spending and Taxes ("COAST"). No corporation owns 10% or more of the stock of either SBA or COAST.

Respondents, who were Defendants-Appellees below, are the Ohio Elections Commission, its Commissioners (John Mroczkowski, Bryan Felmet, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Larry Wolpert, and Charles Calvert) in their official capacities, its staff attorney (Philip Richter) in his official capacity, the Ohio Secretary of State (Jon Husted) in his official capacity, and Steven Driehaus.

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The Court of Appeals' opinion (Pet.App.1a) is available at 2013 WL 1942821. The District Court's opinions dismissing the petitioners' complaints (Pet.App.21a, Pet.App.42a) can be found at 805 F. Supp. 2d 412 and 2011 WL 3296174.

JURISDICTION

The Sixth Circuit entered judgment on May 13, 2013, and denied rehearing en banc on June 26, 2013. Pet.App.64a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Believe it or not, it is a criminal offense in Ohio to make a knowingly or recklessly "false" statement about a political candidate or ballot initiative. Petitioners are advocacy groups that sought to challenge that law under the First Amendment: One group criticized a Congressman's support for the Affordable Care Act and was haled before the state elections commission, which found probable cause to pursue charges against it. The other group wanted to repeat the same message, but refrained from doing so because of that enforcement action.

Despite these concrete injuries, the courts below dismissed both lawsuits on jurisdictional grounds, finding the First Amendment claims unripe because (i) it was not *certain* that the groups would again be subjected to enforcement action if they repeated their speech; (ii) the elections commission had not reached a *final* determination on whether their speech was unlawful; and (iii) the *groups* maintained that their statements were true. That holding, consistent with the Sixth Circuit's uniquely restrictive approach to

pre-enforcement review under the First Amendment, effectively insulates this patently unconstitutional regime from *any* federal judicial review.

1. **Susan B. Anthony List Criticizes Rep. Steve Driehaus for Supporting the Affordable Care Act.** Susan B. Anthony List ("SBA") is a national pro-life advocacy group. During the 2010 elections, SBA criticized Members of Congress—including Steven Driehaus (D-OH)—who voted for the Affordable Care Act ("ACA"). Among other things, SBA planned to erect billboards in Rep. Driehaus' district, stating: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." Pet.App.3a.

2. **Rep. Driehaus Hales SBA Before the Ohio Elections Commission.** After SBA's billboards were reported in the news, Driehaus filed a complaint with the Ohio Elections Commission ("OEC"), alleging that SBA's speech violated Ohio Rev. Code § 3517.21(B)(10). Pet.App.3a. That provision makes it a crime to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard for whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." A parallel provision proscribes false statements "designed to promote the adoption or defeat of any ballot proposition or issue." *Id.* § 3517.22(B)(2).

The OEC is empowered to investigate complaints under those provisions, which may be filed by "any person"; if the OEC finds a violation, it "shall refer" it to prosecutors. *Id.* §§ 3517.153-157. An individual who is twice convicted of violating the elections code "shall be disfranchised." *Id.* § 3599.39.

Driehaus alleged that the Affordable Care Act does not appropriate federal funds for abortions, and that SBA's statements were thus false. The dispute arises, *inter alia*, from the Act's creation of a subsidy for lower-income individuals to help pay insurance premiums; the money is sent directly from the federal treasury to the insurer. ACA, §§ 1401, 1412(c)(2)(A). Under the Act, federal dollars *may* be used to subsidize abortion-inclusive coverage, but insurers *cannot* use the specific federal dollars to pay for most abortions. ACA, § 1303(b)(2). Rather, the abortions must be paid for out of a separate account funded solely by enrollees. *See id.*

For some people, like Driehaus, that segregation rule was sufficient to "refute" the claim that the Act finances abortion. For others, like SBA, it was a mere accounting gimmick, with fungible federal funds still being used to buy abortion-inclusive coverage, thereby indirectly funding abortion.

3. **The OEC Complaint Succeeds in Suppressing SBA's Speech.** SBA's billboard "never went up because the advertising company that owned the billboard space refused to put up the advertisement after Driehaus's counsel threatened legal action against it" under the Ohio law. Pet.App.3a.

4. **The Commission Finds Probable Cause.** As a result of Driehaus' complaint, SBA was forced to divert its time and resources—in close proximity to the election on which it wanted to focus—to hire legal counsel to defend itself before the OEC.

An OEC panel held a hearing on Driehaus' complaint and voted 2–1, with the sole Republican dissenting, to find probable cause that SBA violated the law, and thus to allow the charges to proceed to

the full Commission. Driehaus thereafter issued voluminous discovery requests to SBA and third parties. Pet.App.4a. Ultimately, however, Driehaus lost reelection and moved to withdraw his complaint; the OEC granted the motion. Pet.App.5a.

5. **SBA Sues, and Alleges Intent To Repeat Its Message.** While Driehaus' complaint was pending, SBA filed a federal suit challenging the Ohio law on First Amendment grounds. Pet.App.4a-5a. The district court stayed the suit under *Younger v. Harris*, 401 U.S. 37 (1971), due to the pending state proceedings. After Driehaus' complaint was dismissed, the court lifted the stay; SBA then amended its complaint to allege that it wanted to engage in similar speech in the future, as to other candidates in Ohio, but was chilled from doing so. Pet.App.5a. Driehaus, in turn, filed a counterclaim against SBA, alleging defamation based on the abortion-funding "falsehood."

6. **Coalition Opposed to Additional Spending and Taxes Is Chilled and Also Files Suit.** Petitioner Coalition Opposed to Additional Spending and Taxes ("COAST") agreed with SBA's criticism of Driehaus, and wanted to disseminate the following statement: "Despite denials, Driehaus did vote to fund abortions with tax dollars." Pet.App.5a. But, due to the then-ongoing action against SBA, it was afraid to do so. Pet.App.6a. Instead, while that action was still pending, it also filed a federal lawsuit challenging the Ohio law under the First Amendment. *Id.*

7. **The District Court Dismisses Both Suits.** After consolidating the suits, the court dismissed. As to COAST, it reasoned that any injury was "far too attenuated," and any chill of its speech was just

"subjective," because prosecution was "speculati[ve]." Pet.App.57a. "[N]o complaint against COAST has been or is pending." Pet.App.58a. Moreover, since COAST maintained that its speech was true, it "has not even alleged any intention not to comply" with the law. Pet.App.56a. Similarly, as to SBA, the court found that it had not proved that the law "will be immediately enforced against it." Pet.App.34a. As such, the undisputed "chill" of SBA's speech was not cognizable injury. Pet.App.33a. The court added that, while SBA had been subject to enforcement action, its challenge was still unripe because the OEC had not reached a final merits determination. "Without enforcement action pending at any stage, a case or controversy does not exist." Pet.App.29a.

The court also denied summary judgment on Driehaus' defamation counterclaim, holding that SBA's statements were false because the ACA did not directly appropriate federal funds for abortions. *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 435-36 (S.D. Ohio 2011).

8. **The Sixth Circuit Affirms.** The Sixth Circuit affirmed the dismissals, relying on Circuit precedent holding that neither past enforcement of a speech-suppressive rule, nor chill arising therefrom, suffices to prove "an imminent threat of *future* prosecution." Pet.App.8a-10a (citing *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955 (6th Cir. 2009); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002)).

The panel thus ruled that the OEC's finding of probable cause was irrelevant, because it was not a "final adjudication" of liability. Pet.App.12a. And, although anybody could file a complaint before the

OEC and thereby "set the wheels" of enforcement in motion, it was "speculative" that any such complaint would be filed in the future. *Id.* This was because Driehaus' future candidacy was uncertain, and, although SBA had alleged an intent to make the same criticisms about other Ohio candidates who had supported the ACA, SBA could not identify a specific person who would complain if it did. Pet.App.12a-14a. Moreover, because SBA "does not say that it plans to lie or recklessly disregard the veracity of its speech," instead maintaining the truth of its position, it had not "sufficiently alleged an intention to disobey the statute." Pet.App.15a.

The panel observed that COAST's position was "somewhat different" from SBA's, but its conclusion was the same. *See* Pet.App.18a. COAST moved for rehearing en banc, which was denied. Pet.App.64a.

REASONS FOR GRANTING THE PETITION

Two terms ago, this Court held that even false statements are protected by the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012). Even the dissenters agreed that laws proscribing false statements about "matters of public concern" would create a "potential for abuse of power" "simply too great" for the First Amendment to tolerate. *Id.* at 2564 (Alito, J., dissenting). As all of the Justices correctly recognized, allowing the government to serve as arbiter of political truth cannot be squared with basic free-speech principles.

Yet nearly one-third of the states still have statutes prohibiting "false" statements made during political campaigns—often, as in Ohio, with criminal sanctions attached. *See infra* n.2. These laws do exactly what *Alvarez* warned against, inserting state

bureaucrats and judges into political debates and charging them with separating truth from oft-alleged campaign "lies." Such statutes are almost certainly unconstitutional, yet they play a troubling, harassing role in every political campaign in those states.

Under the decision below, they will continue to do so. The Sixth Circuit has created a paradigmatic Catch-22, whereby a speech-restrictive law cannot be challenged before, during, or after prosecution—only once the speaker has been successfully convicted. *Younger* precludes challenges *while* enforcement is pending. Under the decision below, a challenge *prior* to enforcement is "speculative," even if enforcement proceedings are pending against another speaker based on the same speech (COAST). And even *after* a commission finds "probable cause" that a criminal statute has been violated, there is purportedly still no "credible threat of prosecution," even against the *same* speaker for the *same* speech—unless, perhaps, he concedes that his speech is "false" (SBA). But, of course, speakers threatened by these laws do not and will not admit that their statements are false; their concern is that their political opponents will contend otherwise, imposing litigation costs and political burdens as a penalty for the speech.

Thus, under the decision below, judicial review—not only of this law, but of any speech-suppressive statute—can in practice only be had once a party is actually convicted. But as this Court has long recognized, the inevitable consequence of such a regime, whereby the speaker must suffer indignities, expenses, and penalties before he may adjudicate his constitutional rights, is self-censorship, degrading robust political debate. This is particularly true and

troublesome here, because the opinion below provides a clear blueprint for coercing censorship of core political speech during electoral campaigns—when the need for uninhibited speech is at its zenith. All that political opponents need do, as they have routinely done in Ohio (*see* p.34, *infra*), is complain about controversial speech and obtain politically valuable "probable cause" findings *before* the election, and then drop the complaints *after*, once the damage has been done and the speech can no longer influence important electoral decisions. The statute is thereby shielded from any judicial review.

All of this is very wrong, and very much at odds with the precedent of this Court and other Circuits. This Court has repeatedly found a "credible threat of prosecution," entitling a speaker to pre-enforcement review, based on just the existence of the suppressive law and the party's intent to take action that arguably violates it. Absent an express commitment by prosecutors *not* to enforce the law, such a party has a plain basis to fear prosecution. The resulting "chill" of its speech is therefore not subjective or irrational, but an objective injury-in-fact that must receive federal judicial attention if freedom of speech is to have practical meaning. Seven other Courts of Appeals understand that, and so have adopted a clear presumption: A credible threat of prosecution will be found if a party's intended speech *arguably* runs afoul of a law on the books, absent desuetude or a prosecutorial commitment *not* to enforce it. This nearly uniform rule simply reflects the reality that prosecutors normally do prosecute and, in all events, that the First Amendment "does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

The contrary opinion below is, however, in line with the Sixth Circuit's uniquely restrictive approach to justiciability in pre-enforcement First Amendment cases. Here, of course, the court found advocacy groups' challenges nonjusticiable despite a probable-cause finding issued by a state commission about the *same speech* that the groups indisputably intended to engage in. In other cases, the Sixth Circuit has dismissed challenges where parties quite reasonably feared prosecution under speech-restrictive laws that were never disavowed, and had previously been enforced, even against the same speakers. The Sixth Circuit does not just fail to presume a credible threat of prosecution (as other Circuits do), but imposes insurmountable obstacles to proving one—effectively requiring *particularized* and *certain* threats of *successful* prosecution, and, absent such certainties, dismissing chill as merely "subjective."

In addition to departing from its sister Circuits on the more general "credible threat of prosecution" standard, the decision below squarely contradicts the Eighth Circuit's resolution of a virtually identical challenge to a virtually identical law in 2011. Reversing a district court, the Eighth Circuit allowed a speaker to challenge Minnesota's false-statement law: The statute was not in "disuse" and the state had not promised not to enforce it, and that was—per the usual presumption adopted by the Eighth and most Circuits—sufficient for standing and ripeness. Moreover, despite maintaining the truth of its statements, the plaintiff had a reasonable fear of prosecution, according to the Eighth Circuit, given that past complaints had been filed against it. The decision below, by contrast, held exactly the opposite on indistinguishable facts.

In short, the Sixth Circuit's approach to pre-enforcement challenges—in general and in this context—cannot be squared with the decisions of other Circuits or basic First Amendment principles. Yet it has profoundly impaired constitutional rights, shutting down numerous challenges to all manner of speech codes and chilling an unknowable quantity of speech. In this case, application of the Sixth Circuit's restrictive rulings has assured perpetuation of a blatantly unlawful regime under which bureaucrats are the supreme fact-checkers for every political campaign—a regime that has, predictably, been routinely abused and will continue to be, absent this Court's intervention.

I. THE SIXTH CIRCUIT HAS IRRECONCILABLY DEPARTED FROM SEVEN OTHER CIRCUITS BY ERECTING SUBSTANTIAL HURDLES TO REVIEW OF SPEECH-SUPPRESSIVE LAWS.

The Sixth Circuit's standard for whether a "credible threat of prosecution" exists, such that a pre-enforcement challenge may be mounted, is starkly different from that in seven other Circuits. The latter quite naturally presume such a threat if the plaintiff's intended speech arguably runs afoul of a speech prohibition, with that presumption subject to rebuttal only if the law has fallen into disuse or the government has made a firm commitment not to enforce it. But the Sixth Circuit, in case after case, has forbidden challenges, even *after* prior enforcement, unless the government took *specific* action to concretely threaten the *particular* plaintiff with *future* prosecution and the plaintiff admits that the speech violates the law.

More particularly, the Sixth Circuit's refusal to allow a pre-enforcement challenge to Ohio's false-statement statute rejects at every turn the position taken by the Eighth Circuit, which allowed the same challenge to be pursued against Minnesota's nearly identical statute. The decision below will prevent *any* court from reaching the merits of the Ohio law's constitutionality, other than after a final conviction.

A. Seven Circuits Ordinarily Presume That a Credible Threat of Prosecution Exists If the Intended Speech Is Arguably Proscribed, But the Sixth Circuit Demands Much More.

Standing and ripeness in a First Amendment challenge is satisfied if the speaker faces a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The speaker need not "undergo a criminal prosecution" before seeking relief. *Doe v. Bolton*, 410 U.S. 179, 188 (1973). But the Sixth Circuit, although paying lip service to the "credible threat" principle, applies a standard for satisfying it that sharply departs from its sister Circuits. Indeed, that court has effectively converted the standard into one of "*particularized* and *certain* threat of *successful* prosecution."

The Sixth Circuit's test cannot be satisfied even if a party has been subjected to prior enforcement proceedings for the same speech. This is purportedly because only a formal finding that specific speech is unlawful "establishes an imminent enforcement threat," while a previous finding of "probable cause" to so believe merely threatens the speaker with costly and intrusive "proceedings that may—or may not—find an infraction." Pet.App.11a. This test is irreconcilable with that used in seven other Circuits.

1. The First Circuit offered a clear rule for when a "credible threat of prosecution" exists in *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996). The plaintiff there wanted to make expenditures "arguably prohibited" by a campaign finance statute. *Id.* at 18. The court held that where a "non-moribund" law arguably proscribes speech, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence" like disavowal by state authorities. *Id.* at 15. "[A] pre-enforcement facial challenge to a statute's constitutionality is entirely appropriate unless the state can convincingly demonstrate that the statute is moribund or that it simply will not be enforced." *Id.* at 16.

The First Circuit subsequently reaffirmed that rule. In *Rhode Island Association of Realtors, Inc. v. Whitehouse*, 199 F. 3d 26, 31 (1st Cir. 1999), emphasizing the need to be "sensitive to the danger of self-censorship," the court noted that the statute, albeit never enforced, had not "fallen into desuetude," nor had the state "disavowed" it. *Id.* at 31-32. Rather, nonenforcement simply showed that the prohibition had "proven to be an effective [speech] deterrent." *Id.* In *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003), the court similarly permitted a pre-enforcement challenge to a criminal libel law. In determining "whether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low. ... A finding of no credible threat of prosecution under a criminal statute requires a long institutional history of disuse." *Id.* at 57.

Other Circuits followed. The Seventh Circuit, citing the First, held that "a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute." *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998). As Judge Posner elaborated, "[a] plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (citations omitted). If the statute "arguably covers" intended speech, "and so may deter constitutionally protected expression ..., there is standing." *Id.*

The Fourth Circuit, too, adopted the same rule. As Judge Wilkinson explained, the First Circuit's presumption "is particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights." *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). "A non-moribund statute that 'facially restricts expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *Id.* No such evidence existed there because prosecutors expressed no "intention of refraining from prosecuting those who appear to violate the plain language of the statute." *Id.* at 710-11.

The Eighth and Ninth Circuits are in accord. In *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006), the plaintiffs "ha[d]

neither violated the Minnesota Statutes nor been threatened by Appellees with prosecution," yet the court found a credible threat. *Id.* at 485. Citing *New Hampshire Right to Life* and *Majors*, it observed that the statute in question was not "dormant" and that the state had "not disavowed an intent to enforce" it. *Id.* at 485-86. And the Ninth Circuit held, in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003), that, "if the plaintiff's intended speech arguably falls within the statute's reach," then the speaker may "suffe[r] the constitutionally recognized injury of self-censorship" and bring suit. *Id.* at 1095; *see also Az. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006-07 (9th Cir. 2003) (finding credible threat where "Arizona has not suggested that the legislation will not be enforced ... nor has [it] fallen into desuetude").

The Second Circuit has gone even further, finding standing even when enforcement authorities affirmatively argued that the speech was *not* prohibited. In *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000), for example, the State argued that it "has no intention of suing VRLC," invoking an alternative reading of the statute under which the speech was permitted. *Id.* at 383. But so long as there was a "reasonable enough" construction under which the plaintiff's speech was proscribed, it "may legitimately fear that it will face enforcement of the statute by the State brandishing" it. *Id.* Notwithstanding the State's present intention not to enforce, "there is nothing that prevents the State from changing its mind." *Id.*; *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003).

While the D.C. Circuit has adopted a demanding test for showing a credible threat of prosecution under a law "not burdening expressive rights," it agrees that, in First Amendment cases, it suffices that "plaintiffs' intended behavior is covered by the statute and the law is generally enforced." *Seegars v. Gonzales*, 396 F.3d 1248, 1252, 1253 (D.C. Cir. 2005). Thus, in *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), the court allowed a pre-enforcement suit even though it was clear that the plaintiffs were "not faced with any present danger of an enforcement proceeding" because the agency was deadlocked. *Id.* at 603. As Judge Silberman reasoned, a credible threat still existed because "[n]othing ... prevent[ed] the Commission from enforcing its rule at any time with, perhaps, another change of mind [of a Commissioner]." *Id.* at 603-04.

In sum, the First, Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits all agree that, in the First Amendment context, a pre-enforcement challenge is proper so long as (i) the plaintiff's speech is at least arguably proscribed by the law; and (ii) the law has neither fallen into desuetude nor been bindingly disavowed by prosecutors. This is, as the First Circuit declared, an "extremely low" threshold. *Mangual*, 317 F.3d at 57.

2. Against all that, the Sixth Circuit stands alone. Rather than rely on the commonsense notion that there is a "credible threat of prosecution" when one's speech arguably violates a statute, the Sixth Circuit requires speakers to prove a *particularized*, virtually *certain* threat of *successful* prosecution, thus effectively restricting challenges to after the speaker has been found guilty.

In the Sixth Circuit, citizens cannot bring pre-enforcement challenges even if precisely the same speech has been found by an enforcement agency to probably violate the law; even if it is undisputed that the speaker intends to say the precise words that triggered a prior or pending enforcement; and even if it is undisputed that those proceedings chilled speech. Only a prior *conclusive finding* that the speech violates the law—or perhaps the speaker's admission that it does so—suffices. Since virtually no speaker will voluntarily drain his speech of all persuasive force (and admit a criminal infraction) by averring that the speech is a lie, the only way to challenge speech restrictions in the Sixth Circuit is *after* subjecting oneself to costly administrative hearings and successful prosecution—precisely the result that this Court's precedents reject.

Far from being an outlier, this case is only the latest in a series of free-speech challenges that the Sixth Circuit has thrust aside on justiciability grounds, employing a remarkably demanding test that goes far beyond a credible threat of prosecution. In any other Circuit, these challenges would have reached the merits.

a. In this case, when SBA and COAST filed their suits, SBA was facing actual enforcement proceedings. In those proceedings, the OEC panel found probable cause that SBA violated a criminal law. These proceedings made very clear to SBA and COAST that repeating that message would credibly subject them to prosecution. Driehaus' complaint was dismissed only once he withdrew it post-election.

None of that satisfied the Sixth Circuit. The previous enforcement against SBA was, according to

the court, not evidence supporting a fear of future enforcement, but merely a "prior injury," "not enough to establish prospective harm." Pet.App.9a. Even the probable-cause finding did not show a credible threat of prosecution, because the OEC "never *found* that [SBA] *violated* [the] law." Pet.App.10a (emphases added). To bring a pre-enforcement challenge, apparently you must first be convicted.

Moreover, the threat of prosecution is particularly likely under the Ohio law because enforcement can be triggered by a complaint from *anyone*—not just a single agency or prosecutor. Incredibly, according to the Sixth Circuit, the fact that a multitude of politically-motivated persons could trigger enforcement made it *more* difficult to establish this threat. Pet.App.12a. Plus, it was "far from certain" that the prior complainant, Driehaus, would run again. Pet.App.14a. Of course, as SBA pointed out and nobody disputed, it intended to launch the same criticism over the ACA against *other* candidates for office in Ohio who had supported the Act, and any citizen who supported those candidates could file a complaint. Pet.App.12a (quoting SBA's statement at oral argument that any "citizen in Ohio who supports Obama" could file a complaint). But absent an identifiable complainant, the court found that mere "conjecture." *Id.*

Finally, the Sixth Circuit found SBA could not "establish[] ripeness" because it would "not say that it plans to lie or recklessly disregard the veracity of its speech" in violation of the law. Pet.App.15a. But, of course, the OEC's prior finding of "probable cause"—and the district court holding, in the defamation action, that SBA's statements were

false—made prosecution for false political speech extremely credible. The Sixth Circuit's insistence on a preemptive (and untrue) *confession* to violating a criminal statute therefore does nothing to ensure ripeness, and itself greatly chills speech.

In any of the other Circuits, the district court would have been reversed. The false-statement law is not "moribund" and, not only had the state not "demonstrate[d] that [it] ... will not be enforced," it was actively enforcing it. *N.H. Right to Life*, 99 F.3d at 15-16. The threat to SBA and COAST was certainly "latent in the existence of the statute," especially in light of past enforcement. *Majors*, 317 F.3d at 721. These groups were being "forced to modify their speech" to comply with the statute, and so were suffering injury. *St. Paul*, 439 F.3d at 487. In other Courts of Appeals, a credible threat of prosecution would have been presumed, *especially* given past enforcement proceedings. Obviously, none of the other Circuits would have cared that the Commission had not *already* found the petitioners guilty; in a *pre*-enforcement challenge, one does not demand a *prior* conviction.

Nor would the other Circuits have been bothered by petitioners' maintenance of their innocence: Whatever the speaker may think, a credible threat exists so long as the intended speech is "arguably" proscribed. *See N.H. Right to Life*, 99 F.3d at 18 ("arguably prohibited"); *Majors*, 317 F.3d at 721 ("arguably covers"); *California Pro-Life Council*, 328 F.3d at 1095 ("arguably falls within the statute's reach"). Indeed, some Circuits recognize standing even if the state *denies* that the intended speech is proscribed, because the state may change its mind.

E.g., *Vt. Right to Life*, 221 F.3d at 383. One need not go that far here, where the OEC and district court had already effectively deemed SBA's speech false.

b. The Sixth Circuit's decision below is, however, par for the course in that court. The prior cases that the panel cited reflect the same hostile attitude toward First Amendment challenges.

In *Fieger*, an attorney with a "significant history of criticizing Michigan's judges" was reprimanded under disciplinary rules for "vulgar comments" about judges on his radio show. 553 F.3d at 957, 968. He brought a facial challenge to the rules, but the Sixth Circuit found no standing because Fieger was not "currently being threatened with discipline," *id.* at 973, and had articulated only a "generalized, subjective 'chilling' of speech," *id.* at 965. Past sanction does not prove future injury, said the court, citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983), a Fourth Amendment case that raised no concerns of chill. Moreover, Fieger did not allege that his speech would, in his view, be so "vulgar, crude, or personally abusive" as to violate the rules, only that fear of such a determination was causing him to self-censor. 553 F.3d at 967, 970. Judge Merritt dissented:

> [Fieger] has alleged that he intends to continue being an outspoken critic of the Michigan judiciary. If history is any guide, much of that future criticism could very plausibly be described as "discourteous," putting him in realistic danger of prosecution. The fact that disciplinary action has "only" been brought against him twice does not undermine standing in this context, as the majority contends; it buttresses it.

Id. at 978 (Merritt, J., dissenting).

Fieger, in turn, relied on the earlier decision in *Morrison*, involving a school board with a "policy prohibiting students from making stigmatizing or insulting comments regarding another student's sexual orientation." 521 F.3d at 605. A Christian student who wanted "to tell others when their conduct does not comport with his understanding of Christian morality" sued, after refraining for a year from expressing those views. *See id.* Again, the court dismissed, because "whether [Morrison] would have been so punished [for violating the policy], we can only speculate." *Id.* at 610. The record was "silent" on "whether the school district threatened to punish or would have punished Morrison." *Id.* In the absence of a concrete threat, the court rejected the pre-enforcement challenge: Such a suit requires "some specific action on the part of the defendant," not just existence of a suppressive policy. *Id.* at 609.

The *Morrison* dissent warned that the opinion "unnecessarily muddles established doctrine ... [and] may occlude the doctrine that a threat which chills a plaintiff's speech constitutes an injury-in-fact." *Id.* at 619 (Moore, J., dissenting).

Morrison emphasized that "[c]haracterizing chill as insufficient to establish standing is not original to this panel." *Id.* at 609 (majority op.). True enough. Yet another example of the Sixth Circuit's hostility is *Norton*, which the decision below also cited. *Norton* involved a challenge to the Freedom of Access to Clinic Entrances Act by two anti-abortion activists, who had been "handing out leaflets and speaking with individuals in cars stopped in the [abortion] Clinic driveway." 298 F.3d at 551. One of the two

was called to a meeting "with law enforcement," at which she was advised "that she was ... impeding access to the Clinic," and that a pattern of such conduct "could be considered a violation of the [Act]." *Id.* Following this meeting and a follow-up letter, both protestors ceased their activities "because [they] feared arrest." *Id.* Yet again, the Sixth Circuit found a challenge unripe. Notwithstanding the warning by federal officers, the court said it "cannot conclude that plaintiffs have sufficiently demonstrated that the alleged harm will ever come to pass." *Id.* at 554. This was especially so given that they "professed an intention to comply with the Act," disputing the federal agents' suggestion that their protests might violate it. *Id.* If the protestors wanted to avoid the "uncertainty" about the law, the court suggested they need the government's advice and simply move their counseling activities across the street." *Id.* at 555.

c. The few cases in which the Sixth Circuit *has* allowed First Amendment challenges to proceed only confirm the backward nature of that Circuit's regime—under which prior adjudication of guilt is a prerequisite to suit.

In *Briggs v. Ohio Elections Commission*, 61 F.3d 487 (6th Cir. 1995), a candidate was found guilty of falsely suggesting that she was the incumbent; the OEC declined "to impose a fine or refer the matter for prosecution," but warned that her violation could be held against her in the future. *Id.* at 490. The Sixth Circuit held that the OEC's "promise to consider Briggs's violation, if subsequent complaints come before it, poses a cognizable threat of injury." *Id.* at 492. Similarly, in *Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012), the court allowed an attorney to

bring a First Amendment challenge to Kentucky's Rules of Professional Conduct—*after* the Kentucky Bar Association investigated his speech, found that it did violate the Rules, and "issued a warning letter" that advised compliance. *Id.* at 295-97.

Below, the court distinguished *Briggs* and *Berry* precisely because they involved prior findings of guilt. Pet.App.11a-12a (noting that, in *Briggs*, OEC "actually found a violation" and, in *Berry*, "the bar association was unequivocal that his conduct violated the rule"). Only such *final determinations* create a sufficient injury in the Sixth Circuit. The bizarre consequence of this regime is that one must have been *previously adjudicated* in violation *before* one may challenge a speech-restrictive law—undermining the entire purpose of *pre-enforcement* review. And only in extremely unusual cases where authorities impose no sanctions (like in *Briggs* and *Berry*) may the law be challenged without actually *suffering* penalties.

* * *

In at least seven Circuits, a threat of prosecution is presumed if a law (i) arguably proscribes intended speech and (ii) there is no history of disuse or non-enforcement. But the Sixth Circuit demands a particularized threat of future enforcement (to show that prosecution is *certain*), as well as a prior finding or concession that the speech is unlawful (to show that prosecution would *succeed*). Consequently, it has tossed out challenge after challenge that would easily satisfy other courts. Intervention is necessary to ensure that the First Amendment has equal force in the Sixth Circuit as in the rest of the country.

B. On Nearly Identical Facts, the Eighth Circuit Allowed a Pre-Enforcement Challenge to a Law Prohibiting False Statements.

Moving from the broader legal question to a more particular scenario, the decision below conflicts with a recent decision of the Eighth Circuit on nearly identical facts. There is now a square split on the viability of pre-enforcement challenges to state laws that prohibit false political speech.

In *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), the Eighth Circuit addressed a challenge to Minnesota's false-statement law, which (like Ohio's) forbids dissemination of knowingly or recklessly false statements in campaigns. Under the Minnesota law, like the Ohio law, any person may file a complaint alleging violation of the provision; county attorneys may choose to bring criminal charges after administrative proceedings end. *See id.* at 625. The plaintiff in *281 Care Committee* was an organization opposed to a school-funding ballot initiative; a school official told the media that the school district was "investigating" the organization for spreading "false" information about the initiative. *Id.* at 626. The group was thereafter "chilled from ... vigorously participating in the debate surrounding school-funding ballot initiatives in Minnesota." *Id.*

Although the district court there (as here) dismissed as nonjusticiable, the Eighth Circuit reversed. It explained—in accord with the majority rule—that, "[t]o establish injury in fact for a First Amendment challenge ..., a plaintiff need not have been actually prosecuted or threatened with prosecution." *Id.* at 627. "Rather, the plaintiff needs only to establish that he would like to engage in

arguably protected speech, but that he is chilled from doing so by the existence of the statute." *Id.* Although Minnesota's law had been "infrequent[ly]" enforced, "only in extreme cases approaching desuetude" may lack of enforcement of a statute "undermine the reasonableness of chill." *Id.* at 628.

Nor was the Eighth Circuit bothered that the plaintiffs had "not alleged that they wish to knowingly make false statements." *Id.* The point was that they "*have* alleged that they wish to engage in conduct that could reasonably be interpreted as making false statements"; that was "enough to establish that [their] decision to chill their speech was objectively reasonable." *Id.* Determining political "truth" leaves considerable "room for mistake and genuine disagreement," and thus for allegations of wrongdoing by "political opponents who are free to file complaints under the statute." *Id.* at 630. Further, that the plaintiffs' speech had triggered enforcement proceedings in the past—even though "no complaints ... ever reached the criminal stage and no criminal prosecution was ever threatened"—confirmed the "reasonableness of the alleged chill." *Id.* Even dismissed complaints impose costs, in time and "attorney fees." *Id.*

Addressing ripeness, the Eighth Circuit reasoned that "the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression." *Id.* at 631. It was therefore ripe. *See id.*

On each of these issues, the decision below directly diverged from *281 Care Committee*. Contrary to the Eighth Circuit, the Sixth held that SBA and COAST *did* need to show that they were

"actually prosecuted or threatened with prosecution," and that their "chill" alone was not cognizable injury. 638 F.3d at 627. Contrary to the Eighth Circuit, the Sixth held that fear of a "false prosecution" was categorically unreasonable, even though SBA had already been subject to enforcement proceedings for the same speech—and even though the Commission had found probable cause and the district court had found the speech false. And, contrary to the Eighth Circuit, the Sixth found that "factual development"—*i.e.*, concrete application of the law—was necessary, such that a pre-enforcement challenge to a false-statement law would, in practice, *never* be ripe.

* * *

Conflict between the Sixth and Eighth Circuits over whether any speaker may challenge a speech-restrictive law common to at least 16 states warrants the Court's attention. That this division reflects a deeper dispute over justiciability of pre-enforcement challenges to any speech restriction only makes certiorari even more warranted.

II. THE SIXTH CIRCUIT'S APPROACH IS FUNDAMENTALLY INCONSISTENT WITH FIRST AMENDMENT JURISPRUDENCE.

As should already be obvious, the Sixth Circuit is very much on the wrong side of this lopsided conflict. This Court's First Amendment jurisprudence clearly holds that pre-enforcement review is proper when a speaker refrains from speaking based on a restrictive law that the government has not disavowed; any contrary rule would impose an obvious, direct burden on constitutional freedoms.

A. When a Statute Is Reasonably Construed To Prohibit a Plaintiff's Intended Speech, the Statute Itself Causes "Chill" Injury.

This Court has never required a plaintiff to show certainty, or a particularized threat, that *he* would be prosecuted; or that authorities *already* found his speech unlawful; or that he *agreed* that his speech was proscribed. To the contrary, First Amendment jurisprudence confirms that those showings—now imposed by the Sixth Circuit as prerequisites to pre-enforcement challenge—are both unnecessary for justiciability and irreconcilable with free speech.

The leading case is *Babbitt*, 442 U.S. 289, where a union challenged an Arizona law that prohibited unions from inducing consumers, via "dishonest, untruthful, and deceptive publicity," to refrain from buying certain products. *Id.* at 301. This Court found a "credible threat of prosecution." *Id.* at 298. The plaintiff "actively engaged in consumer publicity campaigns in the past" and "alleged ... an intention to continue to engage in boycott activities." *Id.* at 301. "Although [it] d[id] not plan to propagate untruths," the union could still pursue its challenge, because "erroneous statement is inevitable" and so the union would be forced to "curtail [its] consumer appeals" due to fear of prosecution for "inaccuracies inadvertently uttered." *Id.* (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964)).

Moreover, although the provision "ha[d] not yet been applied," the Court recognized that "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to

challenge the statute.'" *Id.* at 302 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Critically, to show reasonable fear of prosecution, it sufficed that "the State has not disavowed any intention of invoking the criminal penalty provision" and so the union was "not without some reason in fearing prosecution for violation of the ban." *Id.*

The Court reaffirmed *Babbitt* in *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988), involving a state law restricting display of sexually explicit materials. This Court was "not troubled by the pre-enforcement nature of this suit": the State had "not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"; the plaintiffs thus had "an actual and well-founded fear that the law will be enforced against them." *Id.* at 393. It did not matter that the law only *arguably* applied to them; it sufficed that, "if their interpretation of the statute is correct, [they] will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392.

More recent decisions are to the same effect. For example, in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), "preenforcement review" was proper because "[t]he Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do." *Id.* at 2717. Citing *Babbitt*, the Court found that absence of countervailing evidence to be sufficient to create a "credible threat of prosecution." *Id.*

Babbitt, *American Booksellers*, and *Holder* show that (i) the government's non-disavowal of an intent to enforce is enough to presume a credible threat of prosecution; and (ii) a plaintiff need not allege that

he intends to violate the law, only that he intends to engage in action that *enforcement authorities* could think violates the law. Yet, as shown, the Sixth Circuit holds just the opposite on both points.

B. The Sixth Circuit's Reasons for Finding Suits Like This One Unripe Reflect Gross Naiveté About the Evils of Speech Suppression.

In the decision below, as in its other decisions, the Sixth Circuit gave a number of reasons for why pre-enforcement review should not be allowed. Those reasons fundamentally misunderstand the injuries caused by speech-suppressive laws.

1. The Sixth Circuit repeatedly identifies the absence of any pending enforcement proceedings as a basis for denying review. *E.g.*, Pet.App.17a ("No complaint or Commission action is pending against SBA ...."); *Fieger*, 553 F.3d at 973 ("[T]his case does not arise in the midst of a criminal prosecution or disciplinary proceeding."). But the reason why this Court has never required a plaintiff to "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights," *Steffel*, 415 U.S. at 459, is because such a rule would directly infringe constitutional freedoms. Allowing the statute to stand until someone "hardy enough to risk criminal prosecution" is permitted to challenge it would, in the interim, prevent everyone else from exercising their rights, *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *see also Am. Booksellers*, 484 U.S. at 393 ("[T]he alleged danger ... is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). Indeed, that is

indisputably what happened to COAST in this case.[1] (Moreover, once a proceeding is pending, *Younger* precludes preemptive relief.)

2. Below, the Sixth Circuit also discounted the prior "probable-cause" proceedings against SBA, on the theory that "past" actions have no significance for justiciability. Pet.App.10a. Obviously, though, past enforcement of a law that remains on the books—unlike, say, past use of a particular police practice during a random interaction, as in *Lyons*—*is* an extraordinarily good predictor of future enforcement for similar speech. More important, the Sixth Circuit's bizarre regime creates the worst of all worlds for core political speech: enforcement proceedings to chill such speech during campaigns, cessation of such burdensome enforcement once the election-related speech is valueless, and repetition of the speech-deterring enforcement during the next election cycle, without any judicial review in the interim. Such a regime of enforcement that evades review is clearly impermissible; it is well-established, even outside the speech context, that an agency's cessation of enforcement proceedings does not eliminate jurisdiction to challenge them. *See United*

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[1] The Sixth Circuit found that SBA, unlike COAST, was not "chilled" because it continued to express its message after Driehaus filed his complaint. Pet.App.17a. But obviously SBA was not chilled while enforcement proceedings were *pending*; it was already on the hook and *repeating* its already-challenged speech would not subject it to any more prosecution. After the OEC dismissed the proceeding, however, SBA did fear that repeating its message would expose it to additional costs and burdens, and so alleged. Those allegations are undisputed (and obvious, since many other candidates supporting the ACA ran in 2012).

States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," because otherwise defendant would be "free to return to his old ways."). To the contrary, it shifts the burden to the "party asserting mootness" to show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). Yet instead of requiring the OEC to meet that standard—which it plainly could not—the Sixth Circuit held that the voluntary cessation of the OEC proceedings shielded the *entire statute* from judicial review unless *petitioners* proved that future prosecution was virtually certain, thereby directly authorizing and encouraging the abusive tactic of initiating politically motivated proceedings during campaigns and dropping them after. *See infra* p.34.

3. The Sixth Circuit also routinely says that it is "speculative" that a speech-suppressive law will be enforced. Here, it wondered precisely who would file a complaint against SBA or COAST. Pet.App.12a ("Who is likely to bring a complaint to set the wheels of the Commission in motion?"). In other cases, it found it "speculat[ive]" that a school would enforce its speech code, *Morrison*, 521 F.3d at 610 ("The record is silent as to whether the school district ... would have punished Morrison ...."); "speculative" that the Michigan Supreme Court would, "in its discretion, impose [ ] sanctions" for violation of its rules, *Fieger*, 553 F.3d at 967; and "speculat[ive]" that activists would be charged with crimes that

agents warned they might be committing, *Norton*, 298 F.3d at 554. Of course, it is *always* somewhat "speculative" that a prosecutor will bring charges; only the prosecutor knows for sure. But prosecution is at least credible and, more important, *resolving* the speculation requires self-exposure to sanctions, chilling speech. "Speculative" enforcement thus cuts *in favor* of allowing pre-enforcement review. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) ("We cannot ignore such harms just because there has been no need for the iron fist to slip its velvet glove.").

4. Finally, the Sixth Circuit has held it against plaintiffs that they did not concede that their speech would be unlawful. *See* Pet.App.15a ("[SBA] does not say that it plans to lie ...."); *Fieger*, 553 F.3d at 965 (plaintiffs did not allege intent "to make vulgar, crude, or personally abusive remarks"); *Norton*, 298 F.3d at 554 (noting statute's specific-intent element and that "plaintiffs have professed an intention to comply with the Act"). But pre-enforcement First Amendment review is meant to free speakers from chill; what matters is obviously not *their* view of their speech's legality, but whether they *reasonably fear* enforcement by authorities or complainants, which turns on what those people think. *See 281 Care Comm.*, 638 F.3d at 628. And, even if a prosecution is unlikely to succeed, "[t]he chilling effect ... may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski*, 380 U.S. at 487; *accord Mangual*, 317 F.3d at 59 ("The plaintiff's credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that the reporter would be convicted.").

* * *

The bottom line of this Court's First Amendment jurisprudence is that if a law objectively chills speech, it causes injury and can be challenged right away. The Sixth Circuit's contrary approach entirely misses that fundamental point.

III. THE SIXTH CIRCUIT'S APPROACH PROFOUNDLY IMPAIRS FREE SPEECH IN ITS MOST IMPORTANT CONTEXTS.

This case is worthy of this Court's attention because the effect of the Sixth Circuit's approach is to prevent even meritorious challenges to laws that suppress speech, resulting in self-censorship, chill, and degradation of political discourse—the very evils that the First Amendment is designed to combat. As the *SBA-Fieger-Morrison-Norton* pattern illustrates, the effects of the Sixth Circuit's uniquely restrictive approach can be felt in many different contexts; this is a recurring issue of broad significance.

Moreover, the specific context of the decision below creates a special need to reverse the Sixth Circuit's perverse approach. Ohio's false-statement law is far from moribund; the OEC "handles about 20 to 80 false statement complaints per year." *Ohio Elections Commission Gets First Twitter Complaint*, THE NEWS-HERALD (Oct. 29, 2011). The OEC has been asked to determine the "truth" or "falsity" of everything from whether a congresswoman's receipt of donations from a Turkish PAC constituted "blood money" given the Armenian genocide, *State Hears Schmidt Genocide Case*, CINCINNATI ENQUIRER, 2009 WLNR 16019649 (Aug. 14, 2009), to whether a school board "turned control of the district over to the union," Ray Crumbley, *Hearing Set on Complaint*

That School Levy Foes Violated Law, COLUMBUS DISPATCH, 1992 WLNR 4914401 (May 16, 1992), to whether a city council member had "a habit of telling voters one thing, then doing another," *Election Complaint Filed*, CLEVELAND PLAIN DEALER, 1997 WLNR 6374883 (Nov. 12, 1997), to whether a state senator had supported higher taxes by voting to put a proposed tax increase on the ballot, *Ethics Commission Says Bueher Made False Statements*, AP ALERT (Oct. 19, 2007). And at least 15 other states have analogous statutes.[2]

Yet such laws, after *Alvarez*, are almost certainly unconstitutional. *All* the Justices there agreed that laws restricting false political statements would be subject to strict scrutiny. *Alvarez*, 132 S. Ct. at 2548 (plurality); *id.* at 2552 (Breyer, J., concurring in judgment); *id.* at 2564 (Alito, J., dissenting). Even the Solicitor General conceded that laws like Ohio's "are going to have a lot harder time getting through the Court's 'breathing space' analysis." Tr. of Oral Argument 18, *Alvarez*, 132 S. Ct. 2537 (No. 11-210).

Despite that broad consensus, the Sixth Circuit's holdings assure the indefinite perpetuation of this censorious regime. Judicial review is precluded by *Younger while* enforcement proceedings are pending. And the Sixth Circuit's approach makes it impossible

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[2] *See* Alaska Stat. § 15.56.014; Colo. Rev. Stat. § 1-13-109; Fla. Stat. Ann. § 104.271(2); La. Rev. Stat. Ann. § 18:1463; Mass. Gen. Laws ch. 56, § 42; Mich. Comp. Laws § 168.931; Minn. Stat. § 211B.06; Mont. Code Ann. § 13-37-131; N.C. Gen. Stat. § 163-274(a)(8); N.D. Cent. Code § 16.1-10-04; Or. Rev. Stat. Ann. § 260.532(1); Tenn. Code Ann. § 2-19-142; Utah Code Ann. § 20A-11-1103; Wisc. Stat. § 12.05; W. Va. Code § 3-8-11.

to sue *earlier* (because prosecution is "speculative") or *later* (because past enforcement proves nothing). *See also Krikorian v. Ohio Elections Comm'n*, No. 10-CV-103, 2010 WL 41167556 (S.D. Ohio Oct. 19, 2010) (dismissing challenge after OEC issued reprimand). Thus, the *only* way to obtain federal review would be to subject oneself to prosecution and appeal to Ohio courts, hoping that this Court would grant certiorari.

Not only does that regime ensure that untold volumes of political speech will be chilled—in the context where "the constitutional guarantee has its fullest and most urgent application," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)—but it fails to account for the abuse that has predictably become the norm. As in this case, complainants often drop their complaints once the election is over and the political damage done. *E.g.*, *Candidates for Judge's Seat Drop Complaints*, COLUMBUS DISPATCH, 2004 WLNR 21190313 (May 14, 2004); Jim Woods, *Complaint, Suit Over Election Ad Dropped*, COLUMBUS DISPATCH, 2001 WLNR 11914358 (Mar. 2, 2001); Michele Fuetsch, *Mayor Drops Complaint Against Council President*, CLEVELAND PLAIN DEALER, 1998 WLNR 7134266 (July 31, 1998). That leaves no remedy for the speaker's political injury, litigation costs, and distraction:

> The initial hearing alone can require the accused party to spend time and money preparing a defense. And savvy politicians know to make such complaints just before an election, so that the target of the complaint suffers bad publicity in the final days of the campaign, when it is too late for the complaint to be upheld or dismissed.

Speech Police, COLUMBUS DISPATCH, 2012 WLNR 5833464 (Mar. 19, 2012).

Absent this Court's review, there is no solution to the Catch-22 created by the Sixth Circuit's approach, and no way to shut down—or even obtain judicial review on the merits of—the unconstitutional regime under which every election in battleground Ohio and at least 15 other states is now conducted.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID R. LANGDON
LANGDON LAW LLC
8913 Cincinnati-Dayton Road
West Chester, OH 45069

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan Street
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

CHRISTOPHER P. FINNEY
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Ave.
Cincinnati, OH 45208

August 2013

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 13a0473n.06

Nos. 11-3894/3925

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUSAN B. ANTHONY LIST (No. 11-3894) and COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES (No. 11-3925), Plaintiffs - Appellants, v. STEVEN DRIEHAUS; JOHN MROCZKOWSKI; BRYAN FELMET; JAYME SMOOT; HARVEY SHAPIRO; DEGEE WILHELM; LARRY WOLPERT: PHILIP RICHTER; CHARLES CALVERT; OHIO ELECTIONS COMMISSION; JON	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

OPINION

HUSTED,)
Defendants-)
Appellees.)

Before: ROGERS and STRANCH, Circuit Judges; PEARSON, District Judge.*

JANE B. STRANCH, Circuit Judge. The Ohio Elections Commission is an independent agency charged with enforcing the state's campaign-practices laws. This includes regulating false and misleading political statements. Shortly before the 2010 general election, then-Congressman Steven Driehaus filed a complaint with the Commission against Susan B. Anthony List (SBA List), a pro-life advocacy organization that planned to run advertisements against him. SBA List then initiated this suit seeking declaratory and injunctive relief against Driehaus, the Commission's members, and the Ohio Secretary of State. The Coalition Opposed to Additional Spending and Taxes (COAST), an anti-tax advocacy organization, filed a similar federal action, although no state proceedings had been brought against it. After the election, Driehaus and SBA List chose to terminate the state proceeding before the Commission adjudicated the dispute. The district court then consolidated the two federal suits and dismissed all claims for lack of subject matter jurisdiction. Looking only to whether the claims of SBA List and COAST are ripe, we **AFFIRM**.

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*The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

I. BACKGROUND

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, 124 Stat. 119, commonly known as the Affordable Care Act. SBA List, a nonprofit organization that advances pro-life causes, opposes the legislation because it believes that its provisions permit taxpayer-funded abortion. In the lead-up to the 2010 general election, SBA List wanted to put up a billboard in then-Congressman Driehaus's district criticizing his vote in favor of the Act. The planned billboard read: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." But the billboard never went up because the advertising company that owned the billboard space refused to put up the advertisement after Driehaus's counsel threatened legal action against it.

On October 4, 2010, Driehaus filed a complaint with the Ohio Elections Commission against SBA List claiming that the advertisement violated two sections of Ohio's false-statement statute. The first states that "[n]o person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials ... shall knowingly and with intent to affect the outcome of such campaign ... [m]ake a false statement concerning the voting record of a candidate or public official." Ohio Rev. Code § 3517.21(B)(9). The second section prohibits posting, publishing, circulating, distributing, or otherwise disseminating "a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election,

nomination, or defeat of the candidate." *Id.* § 3517.21(B)(10).

A word about the Commission's procedures is critical to understanding what happened next. Ohio law allows "any person" to file a complaint with the Commission alleging a violation of certain election laws. *Id.* § 3517.153(A). If the Secretary of State knows of such a violation, he must lodge a complaint. *Id.* § 3501.05(N)(2). A complaint filed shortly before an election is referred to a panel of Commission members for an expedited hearing to determine whether "probable cause" exists for the full Commission to hear it. *Id.* § 3517.156(A). That panel must refer the complaint to the full Commission if it finds probable cause, dismiss the complaint if it does not, or request a Commission attorney to investigate the matter further if the evidence is insufficient to decide. *Id.* § 3517.156(C). If the Commission finds a violation by clear and convincing evidence, it may refer the matter to a prosecutor, *id.* § 3517.155, although a prosecutor is not obligated to act. The full Commission or probable-cause panel may also determine that a complaint is frivolous and order the complainant to pay reasonable attorney's fees, as well as the Commission's own costs. *Id.* Finally, a party may appeal an adverse final decision of the Commission in state court. *Id.* § 3517.157(D).

On October 14, 2010, a three-member panel voted 2-1 to find probable cause and referred Driehaus's complaint to the full Commission. A hearing was set for two weeks later and the parties began discovery. On October 18, SBA List filed this case in federal district court seeking declaratory and injunctive relief from enforcement of the Ohio statutory scheme,

as well as a temporary restraining order to enjoin the Commission proceeding. The district court denied the motion and stayed the federal action under *Younger v. Harris*, 401 U.S. 37 (1971). This court upheld the stay. *See Susan B. Anthony List v. Steven Driehaus, et al.*, No. 10-4320 (6th Cir. Oct. 28, 2010) (order).

Driehaus and SBA List agreed to postpone the full Commission hearing until after the election on November 4. When Driehaus lost his bid for re-election, he filed a motion to withdraw his Commission complaint. SBA List consented to this and the Commission proceedings ceased on December 2, 2010. Four days later, the district court lifted its stay. On December 21, SBA List amended its complaint to allege that the Commission proceedings following Driehaus's complaint chilled its speech and associational rights. This could happen again, SBA List alleged, if "[a]ny complainant" decided to "hale" the organization before the Commission. SBA List stated its intent to engage in "substantially similar activity in the future" and offered that Driehaus "may run for Congress again." In June 2011, Driehaus and his family moved to the African nation of Swaziland for a two-and-a-half-year appointment with the Peace Corps.

Like SBA List, COAST also wished to criticize Driehaus for his vote in favor of the Act. It intended to send out emails, write blogs, and disseminate press releases with messages similar to SBA List's. In one communication, COAST planned to say this: "Despite denials, Driehaus did vote to fund abortions with tax dollars. Ohio Elections Commission complaint filed to obscure undeniable truth of his

health care vote." COAST filed this federal suit on October 27, 2010, against only the Commission. It claimed that it did not publish these messages because its knowledge of the Commission proceedings against SBA List chilled its ability to speak. COAST did not allege that it was involved in any Commission proceeding, or that the Commission enforced or threatened to enforce any of the challenged laws against it.

The district court consolidated the two cases and granted the defendants' motions to dismiss. As to SBA List's suit, the motions made by the Commission and Driehaus were granted on standing, ripeness, and mootness grounds, and the Secretary's motion was granted on the bases of ripeness and Eleventh Amendment immunity. As to COAST's suit, the Commission's motion was granted based on standing and ripeness. SBA List and COAST now appeal these judgments. We resolve both appeals in this decision.

II. DISCUSSION

A. Ripeness of SBA List's claims

Because the Commission acted on Driehaus's 2010 complaint, but did not reach a final decision or penalize SBA List, this case raises questions regarding SBA List's standing to sue, and whether its claims are moot or ripe for review. *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 491 (6th Cir. 1995). These doctrines "all originate in Article III's 'case' or 'controversy' language," which forms the basis of federal-court jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "We review jurisdictional challenges based on standing, ripeness, and mootness *de novo*." *Miller v. City of Cincinnati*,

622 F.3d 524, 531 (6th Cir. 2010). "As there is no obligation to favor one of these justiciability doctrines over the other and as none of these questions goes to the merits of the case, we may address them in any sequence we wish." *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc) (citation omitted). Here, as in *Warshak*, "[w]e start—and end—with ripeness." *Id.*

Ripeness "'is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Id.* (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). It prevents federal courts from "entangl[ing]" themselves in a "premature adjudication" of legal matters, even ones involving constitutional issues, "that may with time be satisfactorily resolved at the local level and that may turn out differently in different settings." *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 537 (6th Cir. 2010) (citations and internal quotations marks omitted). In its broadest formulation, the ripeness doctrine poses "a question of timing" and counsels against resolving a case that is "anchored in future events that may not occur as anticipated, or at all." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997).

"Three factors guide the ripeness inquiry: (1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Berry v. Schmitt*,

688 F.3d 290, 298 (6th Cir. 2012) (internal quotation marks omitted).

1. **Likelihood of harm**

In the First Amendment context, the likelihood-of-harm analysis focuses on "'how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute.'" *Id.* (quoting *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002)). Although a plaintiff is not required to "'expose himself to actual arrest or prosecution'" before challenging the constitutionality of a statute, *id.* at 296 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)), he must nonetheless show "a credible fear" that it will be enforced against him, *Norton*, 298 F.3d at 554. We first consider the imminence of the threat of prosecution against SBA List at the hands of the Commission members, Secretary Husted, and Driehaus. We then evaluate the sufficiency of SBA List's alleged intent to disobey the challenged statute.

SBA List argues that its ability to speak is chilled by the possibility that the Commission will pursue future proceedings against it for speech—similar to the Driehaus ads—in which it plans to engage. That the billboard never went up, SBA List maintains, shows that its speech already has been abridged and will be diminished again in the future. SBA List also points to the Commission's probable-cause finding and the existence of Ohio's false-statement statute. Taken together, SBA List says, this evidence shows that if it desires to engage in similar speech, an imminent threat of prosecution forces it to choose

between risking further harm or abandoning the speech altogether.

We see it differently. In the normal course, we have little trouble finding a threat of future injury if a plaintiff has been subjected to the challenged action. *Briggs*, 61 F.3d at 492 (quoting dicta from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). However, our precedent in the standing context (which overlaps this part of the ripeness analysis) makes clear that a prior injury, without more, is not enough to establish prospective harm:

> Even *when* a party has been unlawfully sanctioned in the past, we have heeded the Supreme Court's directive that past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects. While previous sanctions might, of course, be evidence bearing on whether there is a real and immediate threat of repeated injury ... where the threat of repeated injury is speculative or tenuous, there is no standing to seek injunctive relief.

Fieger v. Mich. Sup. Ct., 553 F.3d 955, 966 (6th Cir. 2009) (citations and internal quotation marks omitted) (ellipses in original); *see also O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). This is equally true when a plaintiff alleges that his injury is chilled speech. *See Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 609 n.7 (6th Cir, 2008) ("We make no distinction . . . between allegations of a past-experienced chill and allegations of chill seeking forward-looking relief. Without more, both will fail to constitute an injury-in-fact."). "'[S]ubjective chill' alone—without some other indication of imminent

enforcement—d[oes] not constitute injury in fact." *Berry*, 688 F.3d at 296.

The prior harms to which SBA List points—the billboard rejection and the probable-cause hearing—do not help it show an imminent threat of *future* prosecution. The rejected billboard is largely irrelevant. SBA List was unable to place the billboard because the private company that had committed to renting it to SBA List blinked when Driehaus's counsel threatened legal action. The Commission had no role in this failed transaction, and SBA List cannot lay this failure at the Commission's feet to show that its fear of future enforcement is reasonable.

Neither does the probable-cause hearing show an imminent threat of prosecution based on prior enforcement, as the Commission never found that SBA List violated Ohio's false-statement law. Statutorily, the preliminary hearing to which SBA List was subjected decides only "whether probable cause exists for the full commission to determine *whether a violation of Ohio election law has occurred*." Ohio Admin. Code § 3517-1-11(A) (emphasis added). A probable-cause determination is not a "concrete application of state law" that enables SBA List to claim that the law has been enforced against it. *See Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 512 (1984) ("Because the Commission never imposed this sanction . . . we are presented with no concrete application of state law. The issue is hence not ripe for review."). Like an agency's "reason to believe" determination that a violation may have occurred, the Commission's conclusion that probable cause

exists serves only to start proceedings that may—or may not—find an infraction. *See FTC v. Standard Oil of Cal.*, 449 U.S. 232, 241-42 (1980). A probable-cause determination is neither a "definitive statement of position," nor a "definitive ruling or regulation" that establishes an imminent enforcement threat. *Id.* at 241, 243.

Attempting to escape this conclusion, SBA List argues that a final Commission adjudication is not required to show a threat of future harm based on past enforcement activity. It leans heavily on *Briggs* and *Berry* to support its argument that the Commission's acts are sufficient to demonstrate imminent injury. In *Briggs*, after determining that a candidate had violated an election law, the Commission declined to refer the matter for prosecution but said it would consider the violation in future investigations involving the candidate. 61 F.3d at 492-93. *Briggs* "present[ed] a sufficient future threat of injury" to enable her to challenge the statute's constitutionality for three reasons: the Commission actually found a violation, Briggs planned to run for office in Ohio again, and the Commission's policy of using past violations to evaluate later complaints meant the finding had future effect. *Id.* at 492. *Berry* involved an attorney's challenge to an ethics rule that the state bar association, following an investigation, said he violated. Because the bar association was unequivocal that his conduct violated the rule and "instructed [him] to avoid such conduct in the future," we held that the threat of enforcement hung over the attorney and "more than subjectively chilled" his speech. 688 F.3d at 297.

Neither *Briggs* nor *Berry* shows that the Commission's past actions make it likely that the Commission will threaten SBA List with prosecution anytime soon. The Commission's probable-cause determination was not a final adjudication, a finding of a violation, or even a warning that SBA List's conduct violated Ohio law. While it green-lighted further investigation, the Commission expressed no opinion about the application of Ohio law to SBA List's speech. SBA List does not suggest that the probable-cause finding would carry any weight in the future—in this hearing or any other. And its contention that a preliminary assessment that a violation *may* have occurred establishes the threat of future harm finds no support in our cases. No sword of Damocles dangles over SBA List to justify its fears. *See Briggs*, 61 F.3d at 493.

SBA List's claim also suffers from another problem peculiar to the Commission's statutory powers—namely, that the Commission cannot initiate proceedings, but instead must wait for someone to bring a complaint. *See* Ohio Rev. Code § 3517.153(A). This hardly erects an formidable barrier to enforcement, but it does make its likelihood rather speculative. Who is likely to bring a complaint to set the wheels of the Commission in motion? SBA List hazards a guess: "any complainant," it speculates. At oral argument, SBA List was marginally more specific: "some citizen in Ohio who supports Obama." If such conjecture could establish a credible threat of future harm, *any* plaintiff could challenge Ohio's election laws based on *any* intended speech. Article III's "case" or "controversy" requirement does not stretch that far. SBA List has not shown that it

labors under an imminent threat of prosecution by the Commission.

SBA List's claim that it credibly fears that Secretary Husted will enforce the false-statement law against it doesn't fare much better. The organization points to the Secretary's statutory duty to file a Commission complaint if he "has or should have knowledge of" an election-law violation. *Id.* § 3501.05(N)(2). And it warns that Secretary Husted has "exercised his authority" to enforce false-statement claims, and has offered "no indication that he intends to discontinue doing so."

But SBA List does not suggest that the Secretary has ever attempted to enforce the law against the type of speech it intends to make. And more, Secretary Husted has declined to file a Commission complaint against *the actual statement* that gave rise to this litigation during the two-year period the law allows. *See id.* § 3517.157(A). SBA List "can point to no action or statement" that suggests Secretary Husted intends to regulate its speech, making it "far from clear that any harm will occur ... in the future." *Adult Video Ass'n v. U.S. Dep't of Justice*, 71 F.3d 563, 568 (6th Cir. 1995).

We finally consider whether SBA List's fear of imminent enforcement at the hand of Driehaus is credible. Driehaus's 2010 complaint tells us two things. First, Driehaus believed that SBA List violated the false-statement law. Second, Driehaus—just like "any person"—was able to file a complaint and so trigger enforcement proceedings. SBA List asks us to make a third inference—namely, that Driehaus's complaint shows his willingness to file

complaints in the future, posing a continuing threat to SBA List.

This is a stretch. Driehaus remains in Africa on a multi-year assignment with the Peace Corps. He has no cause to complain about allegedly false election ads lobbed against him. SBA List says Driehaus may run for office again, but the evidence is thin at best.[1] It is also far from certain that some future Driehaus candidacy would require the same response from SBA List. Without incumbency, for example, Driehaus may be too insignificant a candidate to attack. Or SBA List may decide that the Act's purported funding of abortions is no longer a timely or effective political message. The degree of speculation required to consider Driehaus a present threat is fatal to SBA List's claimed fears.

The next step of the likelihood-of-harm analysis focuses on whether SBA List has "sufficiently alleged an intention to refuse to comply with the statute." *Berry*, 688 F.3d at 298 (internal quotation marks

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[1] SBA List cites to a newspaper article that reads:

> Asked if there was anything he'd miss about Capitol Hill, Driehaus acted as if he'd been asked if he'd miss a toothache. He laughed a short, derisive laugh.
>
> "No," said Driehaus, who was defeated after one term. "It's a job. I mean, I lost an election. I move on .... I'm not real stuck on being a member of Congress."
>
> Not exactly a ringing endorsement for the place. So, would he ever run again? "I might," he said.
>
> David A. Fahrenthold, *Between losing and going home: The House basement*, Washington Post, Dec. 9, 2010, at A1.

omitted). The statutes SBA List challenges apply only to a person who "knowingly" makes a false statement or disseminates a statement "knowing [it] to be false or with reckless disregard of whether it was false or not." Ohio Rev. Code § 3517.21(B)(9), (10). SBA List would be closer to establishing ripeness if it had alleged that it intends to violate Ohio's false-statement law.

But SBA List does not say that it plans to lie or recklessly disregard the veracity of its speech. Instead, it alleges the very opposite, insisting that the statement it made and plans to repeat—that the Act allows for taxpayer-funded abortions—is factually true. An unqualified intention to comply with a statute whose application depends on "specific facts demonstrating that plaintiffs acted with the requisite ... intent" may preclude a party's ability to show that "the alleged harm will ever come to pass." *Norton*, 298 F.3d at 554. SBA List's insistence makes the possibility of prosecution for uttering such statements exceedingly slim, particularly because SBA List can only be liable for making a statement "knowing" it is false.

It also means the fear animating SBA List's request for prospective relief is the risk of a false prosecution. But SBA List offers no basis for this fear, leaving us to speculate about the reasons. "Not only is that fear misplaced, it's inadequate to generate a case or controversy the federal courts can hear." *Glenn v. Holder*, 690 F.3d 417,422 (6th Cir. 2012). SBA List has not sufficiently alleged an intention to disobey the statute. Given that SBA List has neither done this, nor demonstrated an imminent threat of prosecution at the hands of any defendant,

it cannot show a likelihood of harm to establish that its challenge is ripe for review.

2. Development of factual record

The factual record here is not sufficiently developed to review SBA List's claims. Ohio has not applied its law to SBA List's speech. The Commission has not found that SBA List violated the false-statement law. And no prosecutor has taken any action upon any Commission referral. SBA List says it seeks to engage in substantially similar speech in the future. Allowing such a case to proceed would require us to guess about the content and veracity of SBA List's as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law. A court cannot decide SBA List's claims on this threadbare record without engaging in precisely the kind of conjecture that the ripeness doctrine bars.

SBA List counters that none of these details are relevant because the mere possibility that it ultimately could be sued for engaging in protected speech is factually sufficient to make this matter ripe. That is not correct. SBA List's challenge to the applicability of a statutory scheme to its conduct would benefit from knowing what the scheme prohibits and what it permits. *Ammex, Inc. v. Cox*, 351 F.3d 697, 707-08 (6th Cir. 2003). Some cases surely involve pure questions of law in which "[n]o factual development can change what the statute bans and what it protects." *Macaw*, 132 F.3d at 291. But this is not one of them. And even if SBA List presented a "purely legal question," it "remains a

purely *speculative* legal question ... that may be answered differently in different settings." *Warshak*, 532 F.3d at 528. The current factual record is insufficient to permit review.

3. Hardship if judicial review is denied

Withholding judicial relief will not result in undue hardship to SBA List. No complaint or Commission action is pending against SBA List and, for the reasons discussed above, SBA List has not demonstrated an objective fear of future enforcement. In fact, SBA List's conduct after Driehaus filed the complaint in 2010 suggests that its speech has not been chilled.

Recall that the only speech SBA List alleges it was unable to engage in was putting up the billboard. Apart from this, SBA List continued to actively communicate its message about Driehaus' voting record. SBA List announced on October 19, 2010, for example, its plan to air radio ads claiming that Driehaus voted for taxpayer-funded abortion. And after the district court denied SBA List's motion for a temporary restraining order, the organization issued a press release stating that Driehaus did not want his constituents to hear that he voted for taxpayer-funded abortion. Later still, appearing on television, SBA List's president said that even if the Commission prevented SBA List from putting up its billboards, "we will double down and make sure that our message floods his district. We've got radio ads going out all across his district. We will simply not be intimidated into silence."

This is not the sound of chilled speech or a silenced speaker. "SBA List clearly has not been enjoined from any speech, and all indications are that its

speech continues to be robust." *Susan B. Anthony List*, No. 10-4320, at *4. On these facts, there is no hardship where the evidence suggests SBA List is not deterred from engaging in the very conduct that it claims is encumbered. *See Norton*, 298 F.3d at 555. Withholding judicial review will not result in undue hardship to SBA List.

To conclude: the district court correctly determined that SBA List's challenge is not ripe for review and properly dismissed it for lack of subject matter jurisdiction.

B. Ripeness of COAST'S claims

COAST's claims are somewhat different from those of SBA List, but these differences do not change the analysis. COAST has never been involved in a Commission proceeding and no individual has enforced or threatened to enforce the challenged laws against it. Its claims stemming from the mere possibility that Ohio law will be pressed against it are even more speculative than SBA List's. The preceding analysis compels the conclusion that COAST's claims are unripe.

III. CONCLUSION

We **AFFIRM** the district court's decision to dismiss these suits.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET,
ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Deborah S. Hunt
Clerk

Filed: May 13, 2013

Mr. Michael Anthony Carvin
Mr. Richard N. Coglianese
Mr. Paul Michael De Marco
Mr. Curt C. Hartman

Re: Case No. 11-3894/11-3925, *Susan List v. Steven Driehaus, et al.*
Originating Case No. : 1:10-CV -720: 1:10-cv-00754

Dear Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Laura A. Jones
Case Manager
Direct Dial No. 513-564-7023

cc: Mr. Joshua B. Bolinger
Mr. John P. Hehman
Mr. David R. Langdon
Mr. Wilbert Benjamin Markovits
Mr. Michael Joseph Schuler
Mr. Christopher David Stock

Enclosure

Mandate to issue

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

SUSAN B. ANTHONY LIST, *et al.*, Plaintiffs,	Consolidated Case No. 1:10-cv-720 Judge Timothy S. Black

vs.

REP. STEVE DRIEHAUS, *et al.*, Defendants.

ORDER:

(1) GRANTING DEFENDANT OHIO ELECTION COMMISSION AND ITS MEMBERS' MOTION TO DISMISS SUSAN B. ANTHONY LIST'S AMENDED COMPLAINT (Doc. 29); (2) GRANTING DEFENDANT DRIEHAUS'S MOTION TO DISMISS (Doc. 31); (3) GRANTING DEFENDANT JON HUSTED'S MOTION TO DISMISS (Doc. 49); AND (4) DENYING PLAINTIFF SBA LIST'S MOTION FOR SUMMARY JUDGMENT (Doc. 33)

This civil action is currently before the Court on several pending motions:

(1) Defendant Ohio Election Commission and its Members'[1] motion to dismiss Susan B. Anthony List's

[1] Ohio Elections Commission Defendants include Charles Calvery, John R. Mroczkowkai, Degee Wilhelm, Jayme P. Smoot, Bryan Felmet, Harvey Shapiro, Larry L. Wolpert, and its Staff Attorney, Philip Tichter, collectively the "Commission."

amended complaint (Doc. 29), and the parties' responsive memoranda (Docs. 32, 46); (2) Defendant Driehaus's motion to dismiss (Doc. 31) and Plaintiff SBA List's responsive memorandum (Doc. 32); (3) Plaintiff SBA List's motion for summary judgment (Doc. 33) and the parties' responsive memoranda (Docs. 50, 52, 59); and (4) Defendant Jon Husted's motion to dismiss (Doc. 49), and the parties' responsive memoranda (Docs. 52, 56, 61, 62).[2] The Court heard oral argument on July 12, 2012.

I. STANDARD OF REVIEW

Defendants move for dismissal of this action under Rules 12(b)(1), 12(b)(6), and 12(c)[3] of the Federal Rules of Civil Procedure, claiming that SBA List lacks standing. A motion to dismiss for lack of standing is properly analyzed under Rule 12(b)(1), since "standing is thought of as a jurisdictional matter, and a plaintiff's lack of standing is said to deprive a court of jurisdiction." *Ward v. Alt. Health Delivery Sys.*, 261 F.3d 624, 626 (6th Cir. 2001). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 540 (6th Cir.

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[2] A comprehensive factual background is available at Doc. 64.

[3] "The standard of review for a Rule 12(c) motion is the same as for a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted." *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001).

2004) (citing *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996)).

The plaintiff has the burden of proving jurisdiction when the defendant challenges subject matter jurisdiction under Rule 12(b)(l). *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir. 1986). A facial attack, as in this case, challenges the sufficiency of the pleading itself. Where the Rule 12(b)(l) motion presents a facial attack, the Court accepts the material allegations in the complaint as true and construes them in the light most favorable to the nonmoving party, similar to the standard for a Rule 12(b)(6) motion. *Scheuer v. Rhodes*, 416 U.S. 232, 235-37 (1974).

II. ANALYSIS

A The Commission

1. Ripeness

Under the Constitution, federal court jurisdiction is limited to cases and controversies. U.S. Const. Art. III,§ 2; *In re Cassim*, 594 F.3d 432, 437 (6th Cir. 2010). Accordingly, "[t]he ripeness doctrine has developed 'to ensure that courts decide only existing, substantial controversies.'" *Cassim*, 594 F.3d at 437 (quoting *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 399 (6th Cir. 2001)). Nevertheless, "the ripeness doctrine arises 'both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Id.* (quoting *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993)). Accordingly, "'[t]he ripeness doctrine not only depends on the finding of a case and controversy and hence jurisdiction under Article III, but it also requires that the court exercise its discretion to determine if

judicial resolution would be desirable under all of the circumstances.'" *Id.* at 437-38 (quoting *Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir. 1985)).

"If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992). "Ripeness is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreement." *Thomas v. Union Carbide Agr. Products Co.* 473 U.S. 568, 580 (1985). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). The ripeness inquiry turns on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

In determining whether a case is ripe, the Court looks to: "(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties judicial relief denied at this stage in the proceedings." *Insomnia, Inc. v. City of Memphis, Tenn.*, 278 Fed. Appx. 609, 612 (6th Cir. 2008). The first factor indicates that "'[r]ipeness while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending.'"

Casden v. Burns, 306 Fed. Appx. 966, 971 (6th Cir. 2009) (quoting *Nat'l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)). The second and third factors, however, "reflect the 'prudential aspect of ripeness.'" *Id.* at 972 (quoting *Nat'l Treasury Emp. Union*, 101 F.3d at 1427-28).

a. Likelihood of harm[4]

SBA List claims that it has been injured as a result of the Commission's and Mr. Driehaus's actions to enforce the challenged statutes. (Doc. 17 at ¶¶ 25-27). Specifically, SBA List's intended speech, the billboard, was never erected. (*Id.* At 14). SBA List maintains that if the allegedly false and malicious billboard was sufficiently noncompliant for a finding of probable cause,[5] SBA List intends to engage in

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[4] While this Court acknowledges that the three factor test to determine whether a claim is ripe is "somewhat relaxed" in First Amendment cases, the inquiry specifically focuses on "how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute." *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002).

[5] The Commission's probable cause determination is most similar to an agency's "reason to believe" finding, which courts have held are not ripe for judicial review. For example, in *FTC v. Standard Oil Co.*, the Supreme Court held that the FTC's issuance of a complaint which alleged a "reason to believe" a violation of the Federal Trade Commission Act had occurred, was not ripe for review because it "was not a definitive statement of position. It represent[ed] a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." 449 U.S. 232, 241 (1980). Therefore, like a "reason to believe" finding, a "probable cause" finding is not "actual enforcement" of Ohio law. The Commission's 2010 probable cause determination cannot signify imminent threat of enforcement. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any

substantially similar activity in the future and has no reason to believe that it will survive another probable cause hearing. (*Id.* at ¶12). Specifically, SBA List claims that "there is no reason to think that the Commission would not [enforce the statute] again if Mr. Driehaus resumed his claims against the SBA List, or if the SBA List again mentions a candidate in future lobbying efforts in Ohio." (Doc. 32 at 4).[6]

SBA List argues that it is under a threat of enforcement because Mr. Driehaus has one year to re-file his claim with the Commission. However, Ohio Rev. Code § 2305.19(A) authorizes a party to re-file an original action in a *common pleas court* within

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continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

[6] The allegations before this court concerning harm are almost identical to the allegations that were before the court in *All Children Matter, Inc. v. Brunner*, No. 2:08cv1036, 2011 U.S. Dist. LEXIS 13866 (S.D. Ohio Feb. 11, 2011). In that case, the plaintiffs sought to have various sections of Ohio's campaign finance law declared unconstitutional. Plaintiffs alleged that they thought some hypothetical communications they intended to issue in the future would not be subject to Ohio's disclaimer requirement and that Ohio might try to enforce those requirements against them, so their speech was being chilled. *Id.* at 3-7. The court found that the mere allegation of possible chill was insufficient to establish standing. *Id.* at 7-22.

Here, there is no evidence of any imminent threat of enforcement of Ohio's false statement or disclaimer statutes against SBA List. Whether the Commission, Mr. Driehaus, or the Secretary of State may at some future point seek to enforce Ohio's false statement or disclaimer statutes against SBA List on the basis of some future statement is contingent on a number of uncertain events and, accordingly, SBA List is not under a credible threat of enforcement of Ohio's statutes.

one year of a dismissal. The statute does not address refiling in administrative agencies, and Ohio courts have held that the statute does not apply to administrative appeals from an agency to a common pleas court. *Woodward v. Ohio Rept. of Mental Retardation & Dev. Disabilities*, 826 N.E.2d 891, 894 (Ohio Ct. App. 2005) (finding that Ohio Rev. Code§ 2305.19 "does not apply to administrative appeals which are more akin to an appeal and not procedurally initiated by the filing of a complaint in common pleas court").

Moreover, here the parties to the underlying Commission proceeding first jointly postponed the hearing and then voluntarily agreed to dismissal - and thus the Commission was never given the opportunity to determine whether Ohio law applied to SBA List's advertisement. Therefore, because there has not been any "concrete application of state law," SBA List has not presented any issue ripe for review. *See, e.g., Brown v. Hotel & Restaurant Emp. & Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984) ("Because the Commission never imposed this sanction on Local 54, we are presented with no concrete application of state law. The issue is hence not ripe for review.").[7]

SBA List's primary case supporting its theory of federal jurisdiction is *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995). In *Briggs*, the plaintiff was a candidate against whom the Commission previously enforced Ohio's false

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[7] A failure of ripeness arises most clearly "when litigants seek to enjoin the enforcement of statutes, regulations, or policies that have not yet been enforced against them." *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003).

statement law by finding a state law violation. Specifically, the Commission determined that Briggs was "guilty" of violating the false statement law based on a statement on one of Briggs' campaign billboards, but the Commission did not refer her to prosecution. *Id.* at 490. Instead, the Commission informed Briggs that in the event a complaint is ever filed against her in the future for a similar violation, the Commission would "take into consideration the prior violation." *Id.* at 490. Briggs subsequently filed a federal lawsuit challenging the constitutionality of Ohio's false statement law and alleging that she planned to run for state office in the future using the same political advertisement. *Id.* at 491.

The Sixth Circuit determined that Briggs's federal action was ripe for review and that Briggs had standing. In its analysis, the court explained that "Briggs was threatened with prosecution *in that the Commission found that she violated* [Ohio's false statement law]." *Id.* at 493 (emphasis added). Because the Commission actually enforced and applied Ohio's false statement statute to Briggs's billboard, and held that Briggs's violation would be held against her in any subsequent proceeding, the federal court had before it a "well-developed record sufficient to present the constitutional issues in a clean-cut and concrete form." *Id.* (*quoting Renne v. Geary*, 501 U.S. 312, 322 (1991)).[8]

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[8] In the court's standing analysis, the Sixth Circuit held that although abstract injury is not enough to establish standing, "the Commission's promise to consider Briggs's violation... poses a cognizable threat of injury." *Id.* at 492. Thus, the "commission's policy of using its findings to evaluate future complaints" pushed the abstract injury to an injury-in-fact. *Id.*

The specific facts in *Briggs* that resulted in justiciability are not present in the instant case. The Commission has not determined that SBA List's previous billboard violated Ohio law, or that it will use any such (nonexistent) finding against SBA List in the future. There is no "well-developed" evidence before this Court as there was in *Briggs*.[9] Despite SBA List's argument that the Commission has rendered the statutes "unchallengeable," upon review of *Briggs* (the only case cited to support its position), Plaintiff simply has not alleged the facts necessary to establish jurisdiction.

The statutes are not unchallengeable – SBA List agreed to terminate the Commission proceeding, and therefore declined to challenge the statutes before the Commission had reached any determination on the merits. Without enforcement action pending at any stage, a case or controversy does not exist.

b. Whether the factual record is sufficiently developed

Whether and when some potential candidate will file a complaint against SBA List and whether the Commission would ultimately decide if SBA List's political publication actually violated Ohio's laws requires this Court to speculate – which the ripeness doctrine was designed to prevent. Moreover, the

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[9] In fact, the *Briggs* decision cites a distinguishing case, where a plaintiff challenged a state regulation in federal court relating to the admission of evidence in a state disciplinary proceeding, and because the plaintiff "had not been the subject of such a hearing" the plaintiff did not have an "injury in fact" and lacked standing. *Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 565 (9th Cir. 1990) (citing *Briggs*, 61 F.3d at 493 at n.5).

Sixth Circuit recently observed that "[p]remature adjudication of legal questions compels courts to resolve matters, even constitutional matters, that may with time be satisfactorily resolved at the local level and may turn out differently in different settings." *Miles Christi Religious Order v. Twp. of Fransisco Contegrand*, No. 90-1618, 2010 U.S. App. LEXIS 25908, at *8 (6th Cir. Dec. 21, 2010).

Accordingly, the current factual record is not sufficiently developed such that this Court could make conclusions regarding the likelihood that Ohio's false statement laws might apply to some nonexistent SBA List speech.

c. Hardship to the parties

The final element considered under ripeness is hardship to the parties in deferring consideration by the courts. *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). SBA List claims that under the Commission's standard, the only credible way to address the constitutionality of the challenged statutes would be as an affirmative defense during a proceeding before the Commission. (Doc. 31 at 8-9). Accordingly, SBA List claims that a federal court could never review it, because abstention could prevent it (as in this case), and when the abstention issues resolve because the proceedings are dismissed, it would be unlikely to occur again.[10] SBA List

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[10] SBA List claims that the issue meets the capable of repetition yet evading review standard because: (1) Ohio law allows Mr. Driehaus to revive his suit against SBA List, and there is no reason to believe the Commission will refrain from prosecuting violations of the challenged statutes; and (2) its duration is too short to be fully litigated prior to cessation or expiration. *FEC v. Wisconsin Right To Life*, 551 U.S. 449, 462 (2007). Due to the fact that the probable cause hearing was held only days before

claims that this would present a hardship because it would give candidates and other interested parties free rein to bring lawsuits to chill speech against candidates and then dismiss those claims after the election with no repercussions and no meaningful remedy.

However, as explained *supra* at Section II.A.1.a, SBA List agreed to a voluntary dismissal of the complaint at the state level. Accordingly, it is not this Court that is imposing a hardship on SBA List-it is SBA List which voluntarily agreed to forego its "meaningful remedy' with the Commission.

SBA List has failed to satisfy the prongs of the ripeness test. Under these circumstances, it is without question that Plaintiffs claims are manifestly unripe, leaving this Court with no subject matter jurisdiction to hear SBA List's legal claims.

2. Standing

Standing is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). There is a "conspicuous overlap" between the doctrines of standing and ripeness and the two "often converge[]." *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006). Nevertheless, they warrant separate analyses. "To satisfy Article III's standing requirement, a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; the injury must be 'fairly traceable' to the challenged action; and there must be

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the general election, it would have been unreasonable to expect that the SBA List could have obtained complete judicial review of its claims in time for it to engage in its speech during that time. *Id.*

a substantial likelihood that the relief requested will redress or prevent the plaintiffs injury." *Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

In order to satisfy the standing requirements of Article III of the United States Constitution, SBA List must meet three requirements. Failure to establish any one of them deprives a federal court of jurisdiction to hear the suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, [the plaintiff] must demonstrate he has suffered "an 'injury in fact' that is both concrete and particularized and actual or imminent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, Inc., 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61). Second, "the injury must be fairly traceable to the challenged action of [the defendant]." *Id.* Finally, [the plaintiff] must show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* A plaintiff must plead the components of standing with specificity. *Daubenmire v. City of Columbus*, 507 F.3d 383, 388 (6th Cir. 2007).

"Each element of Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *United States v. Salti*, 579 F.3d 656, 667 n. 11 (6th Cir. 2009) (citing *Lujan*, 504 U.S. at 561). "At the pleading stage, general factual allegations of injury . . . may suffice, for on a motion to dismiss we presum[e] that

general allegations embrace those specific facts that are necessary to support the claim." *Id.* A Plaintiff who alleges a threat of prosecution that "is not imaginary or wholly speculative" has standing to challenge the statute. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

SBA List claims that its injury is: (1) "chilled speech" that is traceable to "the Commission's probable cause finding, coupled with consequent discovery," which "forced" SBA List to spend its money on litigation rather than on other speech during the 2010 election season;[11] and (2) the possible threat of future, groundless election complaints against SBA List by Rep. Driehaus or others.

First, SBA List's allegation of chill is not a sufficient injury-in-fact. To have an injury-in-fact, "a litigant alleging chill must still establish that a concrete harm – *i.e.*, enforcement of a challenged statute occurred or is imminent." *Morrison v. Bd. of Educ.*, 521 F.3d 602, 610 (6th Cir. 2008). However, [w]ith respect to the standing of First Amendment litigants, the Supreme Court finds that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.*, 521 F.3d at 608. Thus, to have standing, a litigant alleging chill "must still establish that a concrete harm – i.e., enforcement of a challenged-statute – occurred or is imminent." *Id.* at 610. See also *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992) ("[W]hether plaintiffs have standing . . . depends on how likely it is that the government will attempt to

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[11] (Doc. 25 at ¶¶ 14, 35-41).

use these provisions against them . . . and not on how much the prospect of enforcement worried them."). SBA List cannot demonstrate that Ohio's statute will be immediately enforced against it and therefore its allegation of chill fails to substantiate the injury-in-fact.

Second, the threat of a future election complaints against SBA List does not demonstrate injury-in-fact. Assuming the truth of SBA List's allegations, its alleged injury amounts to a claim that if it makes a similar statement in the future, Mr. Driehaus or some other unidentified candidate might bring an election complaint and the Commission might misconstrue Ohio's false statement statute by enforcing it against SBA List. There is no evidence of imminent or actual harm, beyond SBA List's self-imposed "chill."

Accordingly, SBA List had failed to meet the first standing requirement. Failure to establish any one requirement deprives a court of jurisdiction to hear the suit. *Lujan*, 504 U.S. at 560.

3. Mootness

The Commission maintains that SBA List's claims are moot because the matter has been dismissed.[12]

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[12] There is no pending complaint or action against SBA List with the Commission. Although SBA List claims its speech is "chilled," the Sixth Circuit held that "SBA List clearly has not been enjoined from any speech, and all indications are that its speech continues to be robust." *Susan B. Anthony List v. Driehaus*, No. 10-4320 at 4 (2010). On November 12, 2010, Mr. Driehaus filed a motion to withdraw his complaints with the Commission before the Commission ever decided whether the billboard violated Ohio law. (Doc. 25 at ¶ 34). SBA List consented to that withdrawal. (*See* Doc. 20). The motion was granted by the Commission on December 2, 2010, thereby

(Doc. 29 at 15). SBA List claims that this case is subject to the "capable of repetition, yet evading review" exception[13] because: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wisconsin Right To Life*, 551 U.S. 449, 462 (2007).

First, SBA List claims that any future Commission complaint by Mr. Driehaus against SBA List may "evade review" because Commission proceedings are "too short to be fully litigated prior to cessation or expiration." However, the parties to the Commission proceeding jointly postponed their hearing until after the November 2010 election and then SBA List consented to the dismissal of the complaint. Accordingly, SBA List took affirmative acts to moot this case. Even if SBA List could show that Mr. Driehaus is likely to bring a Commission complaint against it in the future (which it cannot), that dispute may not evade review – as parties to Commission proceedings routinely appeal false statement decisions through the courts of Ohio, where courts review the Commission's decision on the legal merits and address any constitutional defenses.[14]

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terminating the proceeding and extinguishing the live controversy between the parties.

[13] This exception, however, applies only in "exceptional situations." *Spencer v. Kemna*, 523 U.S. 1, 17(1998).

[14] *See, e.g., Ohio Democratic Party v. Ohio Elections Comm'n*, No. 07AP-876, 2008 Ohio App. LEXIS 3553 (Ohio Ct. App. 2008); *Comm. To Elect Straus Pros. v. Ohio Elections Comm'n* No. 07AP-12, 2007 Ohio App. LEXIS 4797 (Ohio Ct. App. 2007).

Therefore, the Court finds that SBA List's claims are moot.

B. Mr. Driehaus

1. Ripeness

As explained *supra* at Section II.A.1.a, the claims asserted against Mr. Driehaus are not ripe and therefore must be dismissed.

2. Standing

As explained *supra* at Section II.A.2, SBA List does not have standing and therefore its claims must be dismissed. Additionally, SBA List lacks standing to assert any declaratory relief claim against Mr. Driehaus because he is not the public official or one of the public officials, legally charged with enforcing Ohio Revised Code §§ 3517.21(B)(9) and (10) and 3517.20. *Adult Video Ass'n v. U.S. Dep't of Justice*, 71 F.3d 563, 565-67 (6th Cir. 1995) (to establish standing to assert a declaratory relief claim, a plaintiff must show that enforcement action against it by the defendant is actual or imminent, not conjectural or hypothetical). Moreover, SBA List's claim that Mr. Driehaus "may run for Congress again in the future" (Doc. 25 at ¶ 41) does not establish that this suit remains a live controversy and that SBA List had standing to assert claims or that those claims are ripe.[15]

3. Mootness[16]

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[15] It is also important to note that Mr. Driehaus left the United States in June for a two-and-a-half-year assignment as the Peace Corps' director of HIV and AIDS education in the south African nation of Swaziland. (Doc. 50, Ex. 2).

[16] As explained *supra* at Section II.A.3, SBA List's claims are moot.

SBA List requests the following injunctive relief against Mr. Driehaus:

> Enjoin Representative Steve Driehaus, his agents and attorneys, from acting under the color of law by issuing subpoenas relating to Rep. Driehaus' claims against the Susan B. Anthony List under Ohio Revised Code Sections 3517.21(B)(9) and (10)."

(Doc. 25 at 16). However, in its amended complaint, SBA List acknowledges that "[o]n November 12, 2010 Rep. Driehaus filed a motion to withdraw his complaints" with the OEC, and that on December 2, 2010, "Rep. Driehaus' motion to withdraw his complaints against the SBA List was granted." (Doc. 25 at ¶ 24). Based on Mr. Driehaus's voluntary withdrawal, the OEC terminated the only proceedings that Mr. Driehaus initiated against SBA List in that forum. (*Id.*) As a result, Mr. Driehaus and his attorneys are already legally unable to do what SBA List seeks to enjoin them from doing – "issuing subpoenas relating to Rep. Driehaus' claims against the Susan B. Anthony List" in the OEC case. Accordingly, SBA List's injunctive claim is moot. *Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d 684, 691 (6th Cir. 2022) (case is moot if the issues no longer present a "live" controversy between parties or they "lack a legally cognizable interest in the outcome"). Additionally, because the parties voluntarily agreed to dismiss Mr. Driehaus's complaint, SBA List cannot definitively allege that a future Commission complaint will again "evade review."

C. Secretary Husted

1. Ripeness

First, as explained *supra* at Section II.A.1.a, the claims asserted against Secretary Husted are not ripe and therefore must be dismissed.

2. Eleventh Amendment

Additionally, Defendant Husted argues that Plaintiffs' claims against the Ohio Secretary of State must be dismissed for lack of jurisdiction under the Eleventh Amendment. The Sixth Circuit has unequivocally stated that the Eleventh Amendment "bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments." *Thiokol Corp. v. Dep't of Treas.*, 987 F.2d 376, 381 (6th Cir. 1993). The Secretary of State is a state official sued in his official capacity, which is simply another way of pleading a claim against the State of Ohio. *S&M Brands, Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008).

The U.S. Supreme Court carved out an exception to Eleventh Amendment immunity for awards of prospective injunctive relief. Federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *Ex parte Young*, 209 U.S. 123, 160-62 (1908). The rule is limited to actions where the relief sought is equitable in nature and prospective in operation. *Edelman v. Jordan*, 415 U.S. 651, 664-68 (1974). Moreover, the *Ex parte Young* jurisdiction does not apply unless the officer sued has "some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157 (1908). Courts have repeatedly declined to apply the *Young* exception when the defendant state official is not enforcing or threatening to enforce the allegedly unconstitutional statute. *Kelley v. Metro. Cnty. Bd. of Ed.*, 836 F.2d 986, 990-991 (6th Cir. 1987).

Plaintiffs SBA List and COAST argue that the Eleventh Amendment does not bar their claims against the Secretary because Eleventh Amendment immunity does not prevent suits against state officials acting in their official capacities when plaintiffs request prospective injunctive relief. *Zielasko v. Ohio*, 873 F.2d 957, 959 (6th Cir. 1989). Plaintiffs maintain that because the Secretary of State has enforcement power of the challenged laws, he was properly named. (Doc. 25 at ¶¶ 10, 26). Specifically, Plaintiffs claim that the Secretary of State has the affirmative duty to bring complaints to the Ohio Elections Commission if he has reason to know of a violation under Ohio Revised Code §§ 2517.20 to 3517.22, and that the duty to enforce the law creates a threat "equivalent to any other threatened wrong or injury to the . . . plaintiff." *Ex Parte Young*, 209 U.S. at 157. Plaintiffs claim that because the Secretary is obligated by Ohio law to enforce the challenged statutes, he has the requisite connection required by the exception. *Children's Healthcare is a Legal Duty Inc. v. Deters*, 92 F.3d 1412, 1417-18 (6th Cir. 1996).

This Court finds that there is no evidence that the former or current Secretary of State have or are currently seeking or threatening to enforce any of the statutes at issue.[17] In order for a district court to

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[17] Plaintiffs do not allege that the Secretary of State has ever filed an enforcement action under the relevant statutes. Although Plaintiffs allege that former Secretary of State Brunner filed approximately 764 complaints with the Ohio Elections Commission, they do not allege that any of those complaints were for knowingly making false statements in violation of Ohio law or that the Secretary of State threatened them in anyway.

have jurisdiction, there must also be a threat by the government official that he is about to commence a proceeding. *Children's Healthcare*, 92 F.3d at 1414. As the Sixth Circuit recognized, "the phrase 'some connection with the enforcement of the act' does not diminish the requirement that the official threaten and be about to commence proceedings." *Id.* at 1415. There is absolutely no evidence that Secretary Husted has in any way threatened to enforce any proceeding against Plaintiff under Ohio Rev. Code§ 3517.21(B)(9) and (10). The fact that the Secretary of State has the authority to bring complaints to the Ohio Elections Commission is insufficient to meet this standard.

Accordingly, pursuant to the Eleventh Amendment, this Court does not have jurisdiction over the claims alleged against the Secretary of State. *See, e.g., Sombrowski v. Pfister*, 380 U.S. 479, 483 (1965) (calling *Young* "the fountainhead of federal injunctions against prosecutions" and noting that federal judicial power is properly exercised when state officers "threaten and are about to commence proceedings"); *Western Union Tel. Co. v. Andrews*, 216 U.S. 165, 166 (1910) (holding that *Young* applies precisely when a statute charges prosecutors with enforcement *and* they threaten and are about to commence proceedings to enforce the statute). Courts have not read *Young* expansively, and it does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute. *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 18, 112 (3d Cir. 1993) ("joining of a party based solely on his general obligation to uphold the law is appropriate only when there is a real likelihood or realistic potential that

the connection will be used against the plaintiffs interest") (quoting *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3rd Cir. 1987)).

D. SBA List's Motion for Summary Judgment

This Court declines to address any of the substantive issues raised in the motion for summary judgment, as the Court has already determined that this case is not justiciable, and, therefore, this Court does not have jurisdiction.

III. CONCLUSION

Accordingly, as explained herein:

1. Defendants Ohio Election Commission and its members' motion to dismiss Susan B. Anthony List's amended complaint (Doc. 29) is **GRANTED**;
2. Defendant Driehaus's motion to dismiss (Doc. 31) is **GRANTED**;
3. Defendant Secretary of State Jon Husted's motion to dismiss (Doc. 49) is **GRANTED**; and
4. Plaintiff SBA List's motion for summary judgment (Doc. 33) is **DENIED** as **MOOT**.

IT IS SO ORDERED.

Date: 8/1/11

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SUSAN B. ANTHONY LIST, *et al.*, Plaintiffs,	Consolidated Case No. 1:10-cv-720
vs. REP. STEVE DRIEHAUS, *et al.*, Defendants.	Judge Timothy S. Black

ORDER GRANTING DEFENDANTS OHIO ELECTION COMMISSION AND ITS MEMBERS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT OF THE COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES (Doc. 30)

This civil action is currently before the Court on Defendant Ohio Election Commission and its Members' motion to dismiss the second amended complaint of the Coalition Opposed to Additional Spending and Taxes ("COAST") (Doc. 30), and the parties' responsive memoranda (Docs. 35, 51). The Court heard oral argument on 7/12/11.

I. FACTUAL BACKGROUND

A. History

Before the 2010 general election, Plaintiff Susan B.

Anthony List ("SBA List")[1] created advertising material stating "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion" (hereinafter referred to as the "Ad"). (Doc. 17 at ¶ 13). SBA List intended for the Ad to be posted on billboards managed by Lamar Advertising Company ("Lamar"). (*Id.* at ¶ 14). SBA List alleges that Rep. Driehaus' counsel met with Lamar, and Lamar subsequently agreed not to post the Ad on its billboards. (*Id.* at ¶ 14). SBA List nonetheless disseminated the Ad, and similar statements, through other means. (*See id.* at Ex. 3 and 4).

On October 4, 2010, Defendant Rep. Driehaus filed a complaint against SBA List with the Commission[2] alleging that SBA List's publishing of the Ad violated

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[1] The SBA List is a 501(c)(4) organization designed to advance pro-life causes. (Doc. 1 at ¶ 10). Its five-part mission is "to elect pro-life women to Congress through its SBA List Candidate Fund," "to educate voters on critical pro-life women to Congress through its SBA List Candidate Fund," "to educate voters on critical pro-life issues and on upcoming legislation," "to train and equip pro-life activists nationwide to run successful political and grassroots campaigns," "to promote positive responses in both traditional and new media to dispel the myths and distortions of the abortion lobby" and "to advocate the passage of pro-life legislation in Congress, directly with legislators and through mobilizing direct citizen lobbying." (*Id.*)

[2] The mission of the Ohio Elections Commission is to enforce the provisions of Ohio Rev. Code §§ 3517.08, 3517.13, 3517.17, 3517.18, 3517.20, 3517.22, 3599.03 or 3599.031 with justice, equity and fairness, and to issue Advisory Opinions from those sections of law within the jurisdiction of the Ohio Elections Commission. The Commission will respond to and advise interested parties and the citizens of Ohio on matters concerning campaign finance and fair campaign practices in a fair and equitable manner. *See* http://elc.ohio.gov.

two of Ohio's false statement laws, Ohio Rev. Code § 3517.21(B)(9) & (10), and Ohio's disclaimer statute, Ohio Rev. Code § 3517.20. (*Id.* at ¶¶ 15).

On October 14, 2010, the Commission held a probable cause panel to determine whether Rep. Driehaus' complaints should be referred to the full Commission. (*Id.* at ¶ 28). At the hearing, SBA List argued that its statement in the Ad did not violate Ohio's false statement statute because the statements were true. (*Id.* at Ex. 5, Tr. at 16:20-23) ("This bill allows for taxpayer funding of abortion for life, rape and incest. That's taxpayer funding of abortion."); (*Id.* at Tr. 19:18-23) ("It is the law that the advertisement refers to, it is the law that allows for federally funded abortions, and so that statement is categorically true, which we said about the congressman, and therefore this should be dismissed."). A three member panel of the Commission, by a vote of 2-1, nonetheless found probable cause and determined that Rep. Driehaus' false statement claims should be heard by the full Commission, and the panel set an administrative hearing before the full Commission for October 28, 2010. (*Id.* at ¶ 28; Ex. 5, at Tr. 29: 4-19).

Also at the October 14 probable cause panel meeting, the Commission dismissed Rep. Driehaus' claim that SBA List violated Ohio's disclaimer statute. (*Id.* at ¶ 29). SBA List had argued to the Commission that this claim should be dismissed because the federal disclaimer law preempts Ohio's disclaimer law. (*Id.* at Ex. 5, Tr. at 15:3-12). The Commission agreed with SBA List. Accordingly, the Commission dismissed Rep. Driehaus' disclaimer claim for "lack of jurisdiction." (*Id.* at Ex. 5, Tr. 27:6-

7). After the probable cause meeting, the parties commenced with discovery. (*Id.* at ¶¶ 31-36).

On October 18, 2010, SBA List filed this federal lawsuit, requesting a temporary restraining order to enjoin the Commission proceeding. On October 25, 2010, this Court issued an Order denying the motion for temporary restraining order and staying the federal action under *Younger v. Harris*, 401 U.S. 37 (1971). SBA List immediately appealed to the Sixth Circuit and requested an injunction pending appeal, claiming that its speech was "chilled" because of the Commission proceeding. The Sixth Circuit denied the request for an injunction and specifically disagreed with SBA List's allegation that its speech was "chilled," holding that "SBA List clearly has not been enjoined from any speech, and all indications are that its speech continues to be robust." *Susan B. Anthony List v. Driehaus*, No. 10-4320 at 4.2.

Before the November election, Mr. Driehaus and SBA List agreed to postpone the Commission hearing scheduled for October 28, 2010. Mr. Driehaus subsequently lost his bid for re-election on November 4, 2010.

On November 12, 2010, Driehaus filed a motion to withdraw his complaints with the Commission before the Commission ever decided whether the Ad violated Ohio law. (Doc. 17 at ¶ 34). Indeed, the SBA List consented to that withdrawal. (Doc. 20). The motion was granted by the Commission on December 2, 2010, thereby terminating the Commission proceeding. (*Id.*)

On December 6, 2010, this Court lifted the stay on this action that it had imposed in its October 25, 2010

Order. (*Id.*) SBA List subsequently withdrew its appeal of the October 25, 2010 Order.

SBA List was not the only organization that was critical of Mr. Driehaus' vote in support of the federal health care reform legislation -- Plaintiff COAST was also critical of the vote. COAST is an unincorporated association of individuals that operates, and has registered with the Hamilton County Board of Elections, two political action committees, COAST Candidates PAC and COAST Issues PAC.

COAST[3] wanted to engage in political speech through its mass emailed communications, on-line blog, and press releases, including COAST's desire to disseminate an e-mail to its supporters containing First Amendment factual statements and opinions related to Mr. Driehaus and his support of the federal health care reform legislation. (Doc. 35 at 7). Some of the content of COAST's message was similar to the message SBA List wanted to disseminate, but COAST's message also included criticism directed at the Commission. In light of the lawsuit associated with SBA List, COAST alleges that it was fearful of finding itself subject to the same fate. Accordingly, COAST claims that in order to avoid being subjected to the same inquisition as SBA List, COAST withheld dissemination of its proposed e-mail, as well as the

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[3] COAST's mission is to limit the rate of taxes and spending at the federal, state, and local level to within the rate of inflation and to stop the abuse of power by government officials. COAST advances this cause by consistent and principled adherence to limited government and lower taxes in fighting legislation and ballot initiatives that increase taxes and spending beyond the rate of inflation, and by supporting candidates for public office who advance these principles. *See* http://www.gocoast.org.

posting or dissemination of other comments relating to Mr. Driehaus' support of the federal health care reform legislation and its alleged funding of abortions. (Doc. 35 at 9).

Alleging that its First Amendment free speech rights were being chilled, COAST filed a complaint in this Court on October 27, 2010, which case was consolidated with the Susan B. Anthony List case on November 19,2010. (*See* Case No. 1:10cv754 at Doc. 9).

B. COAST'S Amended Complaint

On December 22, 2010, COAST filed its Second Amended Complaint alleging that two of Ohio's false statement laws are unconstitutional on their face and as applied to "citizens and organizations taking positions on political issues." (Doc. 26 at ¶¶ 75, 79). COAST further alleges that Ohio's false statement and disclaimer laws are preempted by federal election law when applied to candidates for federal office. (*Id.* at ¶¶ 80-93). Finally, COAST claims that the "processes and procedures" of the Commission violate COAST's "substantive and due process rights." (*Id.* at ¶¶ 94-100).

COAST's Second Amended Complaint does not allege that it has ever been a respondent/defendant in a Commission proceeding or that the Commission has ever enforced or threatened to enforce any of the challenged Ohio election laws against it. Instead, COAST bases its complaint on its subjective "fear" (*id.* at ¶ 45) that it may be subject to the challenged laws in the future, and that the existence of the Ohio laws have "tempered and/or chilled" (*Id.* at ¶ 54) its First Amendment rights. Specifically, COAST claims its speech has been, or will be, chilled in two ways.

First, COAST claims that before the November 2010 general election, it desired to send an email and post messages on its blog about (former) U.S. Representative Steve Driehaus' vote on the federal health care reform legislation. (*Id.* at ¶ 36). The document stated: "Despite denials, Driehaus did vote to fund abortions with tax dollars Ohio. Ohio Elections Commission complaint filed to obscure undeniable truth of his healthcare vote" (hereinafter referred to as "Driehaus email"). (*Id.* at ¶¶ 37-38, Ex. C). COAST states that the Driehaus email was "a form of issue advocacy." (*Id.* at ¶ 39). Further, COAST recites that the statement in the email is true because "Obamacare allows for taxpayer-funded abortions." (*Id.* at ¶ 24).

COAST alleges that it refrained from sending the Driehaus Email because it was "[f]earful of finding itself subject to the same fate as the SBA List, *i.e.*, dragged before an inquisitional government agency who will sit in judgment of the truth of political speech and being subjected to extensive and intrusive discovery." (*Id.* at ¶¶ 45, 55). Further, COAST alleges that Rep. Driehaus intends to run for election again in 2012.[4] (*Id.* at ¶¶ 46-51). And, "[d]uring the 2012 election cycle," COAST desires to publish the "same or similar statements about other federal candidates who voted for Obamacare, as well as about candidates in local or state elections who either voted to support or voiced support of Obamacare." (*Id.* at ¶ 52). Without its requested injunction and

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[4] However, reports now indicate that "[i]n June [2011] Driehaus, his wife and their three school-aged children will move to Swaziland for what he expects will be a two-and-a-half-year assignment [with the Peace Corps]." (Doc. 51, Ex. 1).

declaration from this Court, COAST claims that it in "fear or threat of being accused of violating" Ohio law. (*Id.* at ¶¶ 57).

Second, COAST claims that it faces a "real and imminent prospect of being brought before" the Commission regarding statements that it desires to make about potential Cincinnati City Council candidates. (*Id.* at ¶ 65). COAST claims that some potential candidates for City Council support introducing street cars as a mode of public transportation in Cincinnati. (*Id.* at ¶¶ 59-63). These potential candidates allegedly believe that the annual operating costs of the street cars will be up to $3 million. (*Id.* at ¶ 61). COAST desires to publish statements during the upcoming election for City Council that the street cars will be nearly $9 million. (*Id.* at ¶ 64). COAST claims that it "has withheld and will continue to withhold" any dissemination of an email relating to the "true operating costs that will be associated with the street cars" because it "faces the prospects of being brought before the Ohio Elections Commission."[5] (*Id.* at ¶ 66, 68).

C. The Ohio Elections Commission

1. Initiating proceedings

The Commission cannot initiate any proceeding or investigate any person or entity on its own initiative. Commission proceedings may only be initiated when

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[5] On April 12, 2011, the Ohio Transportation Review Advisory Counsel withdrew $51.8 million that the panel had targeted for the streetcar funding. TRAC's decision leaves the city's $128 million-plus budget for the first phase of the project about $30 million short. TRAC's action "significantly complicates the streetcar's iffy future." Barry Horstman, "State Panel Yanks Streetcar Funding" The Cincinnati Enquirer, April 12, 2011.

a third party – such as the Ohio Secretary of State, an official at a county board of election, or an individual through affidavit based on sworn personal knowledge – files a complaint with the Commission. Ohio Rev. Code § 3517.153(A). The complaint must set forth facts sufficient to constitute a violation of an Ohio election law over which the Commission has jurisdiction. *Id.*; O.A.C. 3517-1-02(A). No criminal prosecution may commence for a violation of certain Ohio campaign finance laws, including Ohio Rev. Code § 3517.21, until a complaint has been filed in the Commission and the Commission's proceedings are complete. Ohio Rev. Code § 3517.153(C). Thus, the Commission may preclude, but does not initiate a criminal prosecution – only a prosecutor may initiate criminal proceedings.

2. Probable cause review

Where a false statement complaint is filed within 90 days of a general election, Ohio's General Assembly has created a procedural system requiring the Commission to convene a three-member panel to review the complaint and "determine whether there is probable cause to refer the matter to the full commission for a hearing." Ohio Rev. Code §§ 3517.154(B); 3517.156(A) & (B). The probable cause panel must meet within three days after the complaint is filed, except that if good cause is shown to hold the meeting at a later date, the panel meeting can be deferred for up to seven days after the filing of the complaint. Ohio Rev. Code §§ 3517.156(B); 3517.154(A); O.A.C. 3517-10(C). After reviewing the complaint, the three-member panel may do one of the following: dismiss the complaint; determine there is probable cause and refer the complaint to the full

Commission; or request an investigator to investigate the complaint. Ohio Rev. Code § 3517.156(C). If the three-member panel determines there is probable cause, the Commission shall hold an adjudicatory hearing within ten days after the complaint is referred to the full Commission. Ohio Rev. Code § 3517.156(C).

The Commission's dismissal of an action after a finding of no probable cause is not subject to appeal. Ohio courts have explained that during a probable cause panel, the Commission is acting in an executive, rather than an adjudicative, function, and because the probable cause decision is not an adjudication, there is no provision for appeal. *Billis v. Ohio Elections Comm'n*, 766 N.E.2d 198, 201 (Ohio Ct. App. 2001). "By contrast, if the Commission proceeds past the preliminary review stage, finds probable cause, and holds a full hearing, [Ohio courts] have recognized the right to appeal" an adverse determination. *Robinson v. Ohio Elections Comm'n*, No. 04AP-495, 2004 Ohio App. LEXIS 5875, at *8-9 (Ohio Ct. App. Dec. 2, 2004).

3. Limited discovery

Prior to a full Commission hearing, the parties may conduct discovery, pursuant to the Ohio Rules of Civil Procedures. O.A.C. 3517-1-01(C); O.A.C. 3517-1-09(C). The Commission's administrative rules provide that before parties turn to the Commission to compel discovery, parties may "reasonably submit to the request of another party and produce the necessary documents" and other discovery information without intervention by the Commission. O.A.C. 3517-1-09(A). If such efforts fail, an aggrieved

party may "petition the commission to compel the necessary discovery." *Id.*

The Commission may seek to compel discovery, or attendance at a hearing, through issuance of subpoenas, but only to persons located in Ohio. Ohio Rev. Code § 3517.153(B). If, "in the reasonable judgment of the staff attorney," a party's request for subpoena is "overly burdensome or requested solely for the purpose of harassment or delay," the subpoena "shall not be issued." O.A.C. 3517-1-11(B)(3). If the recipient of a subpoena refuses to obey the Commission's subpoena or to be sworn or to answer as a witness, the Commission may apply to the Franklin County Court of Common Pleas under Ohio Revised Code Chapter 2705 (contempt proceedings). Ohio Rev. Code § 3517.153(B). Ohio courts have explained that a Commission subpoena will be enforced so long as: "(1) the inquiry is permitted by law; (2) the records sought are relevant to the matter in issue; and (3) the records' disclosure will not cause unreasonable costs and difficulty." *Ohio Elections Comm'n v. Ohio Chamber of Commerce*, 817 N.E. 2d 447, 455 (Ohio Ct. App. 2004).

4. Prosecution

Commission hearings are conducted in accordance with Ohio's Administrative Procedures Act found in Ohio Revised Code Chapter 119, the Ohio Rules of Civil Procedure, and the Commission's own administrative rules. Ohio Rev. Code § 3517.157(D). As in other agency hearings, parties may make opening and closing statements, examine and cross-examine witnesses, and introduce evidence and

affidavits under the Ohio Rules of Evidence. O.A.C. 3517-1-11(B).

After presentation of the evidence in a false statement case, the Commission may: (1) dismiss the case because the complainant has not met his or her burden of proof; (2) find a violation but determine that good cause exists not to refer the matter to a prosecutor; (3) find a violation, determine that good cause exists not to refer the matter for prosecution, but issue a public reprimand; or (4) refer the matter to the relevant prosecutor for him or her to make determinations and proceed as appropriate under Ohio law. Ohio Rev. Code § 3517.155(A) and (D); O.A.C. 3517-1-11(B); O.A.C. 3517-1-14(D). The Commission may not impose a fine for any violation of Ohio's false statement law. Ohio Rev. Code § 3517.155(D)(2).

The Commission's referral of a matter to the county prosecutor does not mean that a criminal prosecution will occur. As the Sixth Circuit explained in *Pestrak v. Ohio Elections Comm'n* 926 F.2d 573 (6th Cir. 1991), "[t]he ultimate decision on prosecution is clearly made by the prosecuting attorney," and the Commission's recommendation for prosecution is similar to that of a "newspaper, Congressman, or private citizen urging a prosecutor to bring a certain prosecution."

II. STANDARD OF REVIEW

Defendants move for dismissal of this action under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, claiming that COAST lacks standing. A motion to dismiss for lack of standing is properly analyzed under Rule 12(b)(1), since "standing is thought of as a 'jurisdictional' matter,

and a plaintiff's lack of standing is said to deprive a court of jurisdiction." *Ward v. Alt. Health Delivery Sys.*, 261 F.3d 624, 626 (6th Cir. 2001). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 540 (6th Cir. 2004) (citing *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996)).

The plaintiff has the burden of proving jurisdiction when the defendant challenges subject matter jurisdiction under Rule 12(b)(1). *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir. 1986). A facial attack, as in this case, challenges the sufficiency of the pleading itself. Where the Rule 12(b)(l) motion presents a facial attack, the Court accepts the material allegations in the complaint as true and construes them in the light most favorable to the nonmoving party, similar to the standard for a Rule 12(b)(6) motion. *Scheuer v. Rhodes*, 416 U.S. 232, 235-37 (1974).

III. ANALYSIS

Under the Constitution, federal court jurisdiction is limited to cases and controversies. U.S. Const art. III, § 2; *In re Cassim*, 594 F.3d 432, 437 (6th Cir. 2010). Accordingly, "[t]he ripeness doctrine has developed 'to ensure that courts decide only existing, substantial controversies.'" *Cassim*, 594 F.3d at 437 (quoting *Deja Vu of Nashville, Inc. v. Metro, Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 399 (6th Cir. 2001)). Nevertheless, "the ripeness doctrine

arises 'both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Id.* (quoting *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993)). Accordingly, "'[t]he ripeness doctrine not only depends on the finding of a case and controversy and hence jurisdiction under Article III, but it also requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances.'" *Id.* at 437-38 (quoting *Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir. 1985)).

A. Ripeness

"If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992). "Ripeness is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreement." *Thomas v. Union Carbide Agr. Products Co.* 473 U.S. 568, 580 (1985). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). The ripeness inquiry turns on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

In determining whether a case is ripe, the Court looks to: "(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a

fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Insomnia, Inc. v. City of Memphis, Tenn.*, 278 Fed.Appx. 609, 612 (6th Cir. 2008). The first factor indicates that "'[r]ipeness while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending.'" *Casden v. Burns*, 306 Fed. Appx. 966, 971 (6th Cir. 2009) (quoting *Nat'l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)). The second and third factors, however, "reflect the 'prudential aspect of ripeness.'" *Id.* at 972 (quoting *Nat'l Treasury Emp. Union*, 101 F.3d at 1427-28).

COAST alleges that the information it hopes to disseminate is true, *i.e.*, the Driehaus email contains "true statements" (Doc. 26 at ¶ 24) and the "true operating cost" of street cars in Cincinnati will be $9 million (*id.* at ¶ 66). Therefore, COAST has not even alleged any intention not to comply with Ohio's false statement statute, which is a requirement for any ripe First Amendment claim.[6] *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002) ("In a First Amendment pre-enforcement challenge, the inquiry usually focuses on . . .whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute).

Moreover, the Commission cannot enforce any statute against COAST unless someone files a

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[6] COAST challenges a statute that does not, according to COAST, prohibit COAST's intended conduct.

complaint with the Commission. No complaint has been filed against COAST. In order to determine how imminent the threat of prosecution is, this Court must determine: (1) how likely it is that a third party will initiate a third party complaint against COAST based on the statements in the second amended complaint; and (2) how likely it is that the Commission will actually enforce Ohio's false statement statutes. The ripeness analysis cannot simply focus on whether COAST has alleged subjective chill. Here, any possible enforcement depends on a hypothetical communication being disseminated, and a hypothetical person filing a complaint, and a hypothetical finding that there is probable cause to proceed on such complaint. Such speculation is far too attenuated for this Court to find a ripe claim.[7]

COAST argues that "jurisdictional issues such as standing and ripeness are determined at the time the lawsuit was filed." *Sierra Club v. United States Army Corp. of Eng'rs*, 446 F.3d 808, 814 (8th Cir. 2006). COAST alleges that when this action was commenced, *i.e.*, when this Court's subject matter jurisdiction was invoked, the SBA List was being subjected to inquisition by the Commission for making substantively the same statements that COAST wanted to disseminate, and therefore its

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[7] Moreover, even COAST's express language indicates the uncertainty of harm: "in light of the *prospect* or serious *potential* of finding itself dragged before an inquisitional governmental agency" (Doc. 35 at 10 (emphasis added)), COAST has and will continue to restrain and temper its speech so that it avoids violating Ohio Rev. Code §§ 3517.21(B)(9) and 3517.21(B)(10).

claims are ripe.[8] However, just because a case may have been ripe when it was filed (although this Court is not concluding that COAST's case was in fact ripe), does not mean that it was not subsequently rendered moot.

Here, COAST has not demonstrated any imminent threat of enforcement, and no complaint against COAST has been or is pending before the Commission. Accordingly, the Court finds that COAST's claims are not yet ripe for review.

B. Standing

Standing is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). There is a "conspicuous overlap" between the doctrines of standing and ripeness and the two "often converge[]." *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006). Nevertheless, they warrant separate analyses. "To satisfy Article III's standing requirement, a plaintiff must have suffered some

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[8] Since the time of its original October 2010 complaint (Doc. 35 at 16), COAST amended its complaint on December 12, 2010 (Doc. 10) and filed a second amended complaint on December 22, 2010 (Doc. 12), after SBA List and Mr. Driehaus agreed to dismiss the Commission proceeding. Additionally, the Commission moved to dismiss COAST's second amended complaint based on the allegations in that pleading, such as COAST's desire to make similar statements about federal health care legislation in 2012 and COAST's desire to make statements about a potential streetcar issue in the City of Cincinnati for the 2011 elections. Those allegations were not raised in the October 2010 complaint. If it is now COAST's position that the operative complaint is its original complaint, which only addressed the facts relating to Driehaus's 2010 Commission proceeding, then COAST's lawsuit is even more clearly moot.

actual or threatened injury due to the alleged illegal conduct of the defendant; the injury must be 'fairly traceable' to the challenged action; and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiffs injury." *Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, Inc., 454 U.S. 464, 472 (1982)).

In order to satisfy the standing requirements of Article III of the United States Constitution, COAST must meet three requirements. Failure to establish any one of them deprives a federal court of jurisdiction to hear the suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, [the plaintiff] must demonstrate he has suffered "an 'injury in fact' that is both concrete and particularized and actual or imminent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61). Second, "the injury must be fairly traceable to the challenged action of [the defendant]." *Id.* Finally, [the plaintiff] must show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.*

"Each element of Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *United States v. Salti*, 579 F.3d 656, 667 n. 11 (6th Cir. 2009) (citing *Lujan*, 504 U.S. at 561). "At the pleading stage, general factual allegations of injury. . . may suffice, for on a motion to dismiss we presum[e] that

general allegations embrace those specific facts that are necessary to support the claim." *Id.* A plaintiff who alleges a threat of prosecution that "is not imaginary or wholly speculative" has standing to challenge the statute. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

COAST argues that due to the litigation with Mr. Driehaus, COAST faced a real and immediate threat of being prosecuted under the challenged statutes. (Doc. 35 at 20). COAST claims that it has established an injury in fact based on its "objective fear of prosecution" and "chill" of its speech because of Defendant Driehaus's previous complaints filed against SBA List. (Doc. 35 at 19-23). COAST cites a line of cases suggesting that the existence of a statute that chilled protected speech is sufficient to demonstrate an injury-in-fact because litigants should not be "required to await and undergo criminal prosecution." (Doc. 35 at 20, 23 (citing *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979); *St Paul Area of Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006); and *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003)).

All of these cases are distinguishable from the instant case. First, the plaintiffs alleged a specific intent to pursue conduct in violation of the challenged statute.[9] Here, COAST claims that its

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[9] For example, in *St. Paul*, three non-profit corporations wanting to make political expenditures challenged Minnesota's state laws prohibiting corporations from making contributions to candidates. 493 F.3d at 483-84. The district court dismissed the case for lack of standing because the government defendants had not threatened any enforcement of the law against the plaintiffs. *Id.* at 484. The Eighth Circuit reversed, holding that when a plaintiff alleges an intention to engage in conduct

intended speech is true and does not violate Ohio's false statement law. (Doc. 26 at ¶¶ 24, 66). Second, in the cases COAST cites, the statutes at issue infringe on constitutionally protected speech. Here, Ohio's false statement statute does not encroach upon any constitutionally protected speech.[10] Third, the Commission lacks the power to initiate prosecution in false statement cases and COAST only speculates as to the likelihood of any prosecutorial threat. Thus, here the Court finds that such speculative threat of future, groundless action is insufficient for COAST to establish standing to proceed.

Additionally, COAST claims that if SBA List establishes standing, COAST's claims are justiciable as well. (Doc. 35 at 17). COAST cites *Bowsher v. Synar*, 478 U.S. 714, 718 (1986), for this proposition. In *Bowsher*, two separate yet "virtually identical lawsuit[s]" challenged a statute's constitutionality. *Id.* at 718. The cases were consolidated, and the

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"proscribed by a statute," there exists a credible threat of prosecution regardless of whether there had been actual threatened enforcement. *Id.* at 485. Because the plaintiffs asserted that they desired to make political expenditures, and the Minnesota statutes at issue, "on their face," prohibited the corporate political expenditures, the plaintiffs had standing. *Id.* at 485.

[10] *See, e.g., Pestrak*, 926 F.2d at 577 ("false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth"); *Briggs v. Ohio Elections Comm.*, 61 F.3d 487, 494 (6th Cir. 1995) (Ohio's false statement statute "poses no First Amendment difficulty so long as it regulates only false speech made knowing of the falsehood or in reckless disregard for the truth").

district court independently determined that the plaintiffs in each lawsuit had standing. However, as the Court in *NRA of America v. Magaw*, 132 F.3d 272, 278 n.4 (6th Cir. 1997) explained:

> [t]he Supreme Court has stated, there is no need to address the standing of the other respondents, whose position is identical . . . In contrast, in the present case, we deem it necessary to inquire about the standing of each category of plaintiffs because their positions are not identical. The injury-in-fact pled by the Group I plaintiffs is very different from that of Group II or Group III.

Thus, this Court finds that while the *Bowsher* reasoning may apply if multiple plaintiffs presented identical lawsuits, that reasoning does not apply here because COAST and the SBA List lawsuits are not identical. The lawsuits are different in the following ways: (1) COAST raised two additional claims for relief (Counts V & VI); (2) COAST raises a due process claim against the Commission's processes and procedures, which SBA List does not allege; and (3) COAST seeks relief for statements that it *desires* to publish related to the potential streetcar issue in Cincinnati. (Doc. 26 at ¶¶ 48-70, 80-87).

Accordingly, this Court finds that COAST does not have standing.[11] Therefore, because this Court lacks

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[11] *See, e.g., All Children Matter v. Brunner*, No. 2:08cv1036, 2011 U.S. Dist LEXIS 13866 (S.D. Ohio Feb. 11, 2011), where the court dismissed a plaintiff's First Amendment challenge to a broad range of Ohio campaign finance laws finding that ACM, a non-profit corporation intending to engage in issue-oriented campaign speech, failed to provide any evidence "to demonstrate that it has suffered or will suffer an imminent harm through

subject matter jurisdiction, the remaining substantive issues shall not be addressed.

IV. CONCLUSION

Accordingly, Defendants' motion to dismiss COAST's second amended complaint (Doc. 30) is **GRANTED**.

IT IS SO ORDERED.

Date: 8/1/11

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

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enforcement" of the challenged statutes. *Id.* at 14. Rather, AMC only offered its "subjective speculation that the government may in the future take some action detrimental to ACM." *Id.* at 8. "The Court is left only with ACM's scenario of possible events that could lead to, someday, a possible injury. That . . . risk remains too remote to confer standing." *Id.* at 15.

APPENDIX D

FILED
Jun 26, 2013
DEBORAH S. HUNT, Clerk

No. 11-3925

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES, Plaintiff-Appellant,	)	ORDER
v.	)	
STEVEN DRIEHAUS; JOHN MROCZKOWSKI; BRYAN FELMET; JAYME SMOOT; HARVEY SHAPIRO; DEGEE WILHELM; LARRY WOLPERT; PHILIP RICHTER; CHARLES CALVERT; OHIO ELECTIONS COMMISSION; JOHN HUSTED, Defendants-Appellees	)	

BEFORE: ROGERS and STRANCH, Circuit Judges; and PEARSON,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this

* Hon. Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk

OPPOSITION BRIEF

FILED
NOV 27 2013

No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF STATE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for State Respondents

QUESTION PRESENTED

Is a First Amendment challenge to a statute ripe when plaintiffs have alleged only a generalized and subjective chill of their speech and when they have established facts showing neither that they intend to engage in a course of conduct affected by the statute nor that they face any threat of an actual criminal prosecution under the statute by the named defendants?

PARTIES TO THE PROCEEDING

Most Respondents in this Court, defendants-appellees below, are State of Ohio actors: the Ohio Elections Commission; its individual Commissioners, John Mroczkowski, Bryan Felmet, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Larry Wolpert, and Charles Calvert in their official capacities; Ohio Elections Commission staff attorney Philip Richter in his official capacity; and Ohio Secretary of State Jon Husted in his official capacity.

The sole non-State Respondent, also defendant-appellee below, is Steven Driehaus.

Petitioners, plaintiffs-appellants below, are Susan B. Anthony List ("SBA List") and the Coalition Opposed to Additional Spending and Taxes ("COAST").

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INTRODUCTION

The unreported decision below does not warrant review, as it merely applied the settled law of ripeness to particular facts. The Sixth Circuit, like all other circuits, follows this Court's teachings on First Amendment challenges. With respect to standing, the court finds an adequate Article III injury if a plaintiff shows that it faces a "'credible threat of prosecution'" under a statute. *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). With respect to ripeness, the court finds a case sufficiently justiciable if, along with establishing that credible threat, the plaintiff also creates a "record 'sufficient to present the constitutional issues in a clean-cut and concrete form,'" and shows that it would suffer hardship without immediate review. *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493 (6th Cir. 1995) (quoting *Renne v. Geary*, 501 U.S. 312, 322 (1991)). Here, the court applied the established factors for ripeness and found, in a non-precedential decision, that Petitioners' claims were unripe based on all those factors. Nothing about the court's discussion of the relevant principles, its application of them to these facts, or this case's outcome, is remarkable or warrants further review.

While the Petition's allegations of a massive, lopsided circuit split collapse for many reasons, several turn on understanding the unique nature of the Ohio Elections Commission. Ohio prohibits certain false statements made with actual malice in election campaigns, but only county prosecutors—and none is a party here—may prosecute violations. In a case it did find justiciable, the Sixth Circuit has already held that, as a constitutional matter, the Commis-

sion cannot impose penalties, nor enjoin speech. *See Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 578 (6th Cir. 1991). Instead, its functions have been limited merely to "recommending" cases to prosecutors and to "truth-declaring" by stating opinions. *Id.* at 578-79; *see also* Ohio Rev. Code § 3517.155(D)(2). So even if Petitioners could clear the many hurdles to show that the Commission will someday "prosecute" them—and they cannot—that would not amount to a true "prosecution" anyway, and that renders this case a poor vehicle to establish principles in the other cases that involve actual threats of prosecution.

Once these facts are made clear, all of the Petition's arguments for review fail. *First*, the Sixth Circuit is in line with other circuits in articulating the general legal test for a concrete injury that is necessary under both standing and ripeness doctrines. Petitioners do not deny, nor could they, that the circuit states the same *general* "credible threat of prosecution" test as everyone else. They argue instead that the court's application is so different as to amount to a split in practice. But the Sixth Circuit has repeatedly allowed challenges on different facts, including challenges to the *same* Ohio election laws at issue here. *See Briggs*, 61 F.3d at 491-93; *Pestrak*, 926 F.2d at 576-77. Likewise, other circuits have also rejected some First Amendment challenges, while allowing others, based on the facts of each case. The Sixth Circuit simply relied on narrow facts about this case, including that SBA List never specified how its speech was chilled, and, to the contrary, kept speaking despite the Commission's preliminary proceedings. Many similar factual distinctions explain the

different outcomes in the cases cited in support of the alleged circuit split.

Second, critical factual distinctions show that the decision below does not even conflict with the case that the Petition claims to establish the most "square split." Pet. 23 (discussing *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011)). Unlike Petitioners, the plaintiffs in *281 Care Committee* sued the county prosecutors who could prosecute them, not Minnesota's equivalent of the Ohio Elections Commission. *See* 638 F.3d at 625-26. And the Eighth Circuit found that those plaintiffs *were* reasonably chilled from speaking, whereas the Sixth Circuit here found that SBA List spoke as vigorously as ever and had not been reasonably chilled.

Third, the decision below turned on unique facts, rendering it a poor vehicle for establishing any general guidelines. None of the other cases involved a challenge to an administrative "prosecution" by an agency that does nothing other than investigate, and make its own statements and possibly referrals. Moreover, while the Petition challenges the Sixth Circuit's standards for finding a sufficient likelihood of injury for ripeness, it overlooks the opinion's reliance on ripeness's other factors—including the lack of an adequate record for considered review and the lack of hardship from delay. Thus, the alleged split over what is needed to allege sufficient injury would not even control the outcome on the facts here.

In the end, the Sixth Circuit merely called a strike here, but it used the same strike zone as everyone else. It followed this Court's insistence on a "factual record of an actual or imminent application

of [a challenged statute] sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Renne*, 501 U.S. at 321-22.

For these and other reasons below, the Court should deny the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 525 F. App'x 415. The decisions of the district court (Pet. App. 21a, Pet. App. 42a) are reported at 805 F. Supp. 2d 412 and 2011 WL 3296174.

JURISDICTION

The Sixth Circuit entered its judgment in this case on May 13, 2013, and denied rehearing en banc on June 26, 2013. The petition for writ of certiorari was filed on August 9, 2013. The Court has jurisdiction under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT

The Sixth Circuit's decision, and the underlying Ohio Elections Commission action leading to this case, can best be understood in light of the nature of the Commission's role and the circuit's prior history of addressing the same Ohio law at issue.

A. The Ohio Elections Commission Investigates False Statements, But Can Only Undertake Narrow Functions

Ohio election law prohibits certain false statements in election campaigns. Such statements are barred if made with intent to affect an election. *See* Ohio Rev. Code § 3517.21(B). And they are barred only if made with at least the "actual malice" intent

like the one described in *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)—that is, with knowledge that they are false or with reckless disregard as to their falsity. Ohio Rev. Code §§ 3517.21(B), 3517.21(B)(10); *see also McKimm v. Ohio Elections Comm.*, 729 N.E.2d 364, 373-75 (Ohio 2000).

Rather than give complete control to county prosecutors to bring charges under these false-statement provisions, the statute divides their enforcement into several parts. To begin with, any private citizen, or Ohio's Secretary of State, may bring an allegedly false statement to the Ohio Elections Commission's attention. *See* Ohio Rev. Code § 3517.153(A) (authorizing citizen complaints); *id.* § 3501.05(N)(2) (obliging Secretary to report violations known to him).

Once complaints have been filed, the Ohio Elections Commission has limited powers. It may investigate alleged violations, declare whether it finds statements false, and, in some cases, refer its findings to county prosecutors. That is, the Commission's own findings are advisory opinions, and the Commission lacks any substantive enforcement authority of its own. *See id.* §§ 3517.153(D), 3517.155(D)(2).

The law originally empowered the Commission to levy fines and issue cease-and-desist orders with respect to the false-statement provisions at issue here, but the Sixth Circuit invalidated those powers in these circumstances decades ago. *See Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 578 (6th Cir. 1991). *Pestrak* upheld the Commission's remaining functions as applied to allegedly false statements, which it described as "recommending" and "truth-

declaring" functions. *See id.* at 578-79. It compared the referral function to a "private citizen['s]" power to "urg[e] a prosecutor to bring a certain prosecution," and it concluded that "to the extent [the Commission] does nothing more than recommend, then its actions, *per se*, have no official weight and cannot be the cause of deprivation of constitutional rights." *Id.* at 578. The Sixth Circuit found that the Commission's "'truth-declaring' function" did not limit speech either. It merely "determines and proclaims to the electorate the truth of various campaign allegations," and "the statements and findings of the Commission fall exactly within the tenet that 'the usual cure for false speech is more speech.'" *Id.* at 579-80 (citation omitted).

If the Commission refers what it considers to be a violation to a county prosecutor, that prosecutor determines whether to prosecute. Thus, while violations of Ohio Rev. Code § 3517.21(B)(9) and (10) may carry potential criminal penalties, such penalties may arise only after an Ohio prosecutor makes the independent decision that a criminal prosecution is appropriate. *See id.* § 3517.155(D)(2).

Finally, although the Commission can impose no tangible punishment on a party, Ohio law still allows the party to appeal to state court if the Commission finds a possible violation. *Id.* § 3517.157(D). Such appeals are taken. *See, e.g., McKimm*, 729 N.E.2d 364; *Serv. Emp. Int'l. Union Dist. 1199 v. Ohio Elections Comm'n*, 822 N.E.2d 424 (Ohio Ct. App. 2004); *Flannery v. Ohio Elections Comm'n*, 804 N.E.2d 1032 (Ohio Ct. App. 2004).

B. Private Respondent Driehaus Complained To The Commission About SBA List's Statements, But The Complaint Was Dismissed Before A Merits Hearing

In 2010, Respondent Steven Driehaus served in Congress, and was running for re-election to the House of Representatives. Petitioner Susan B. Anthony List (SBA List), a national pro-life advocacy group, opposed Driehaus's vote for the Affordable Care Act. SBA List sought to advertise a message, including on billboards, stating that the vote was a vote for taxpayer-funded abortion. Pet. App. 3a.

When Driehaus learned of the message that SBA List intended to convey on its billboards, he filed a complaint with the Ohio Elections Commission. *Id.* His complaint alleged that SBA List's claim that he voted for taxpayer-funded abortion was knowingly or recklessly false and that it therefore violated Ohio Rev. Code § 3517.21(B)(9) and (10). Pet. App. 3a-4a.

Driehaus's counsel contacted the advertising company that owned the billboard space on which SBA List wished to display its message. Pet. App. 3a. After that separate contact, the advertising company decided not to display SBA List's message. *Id.*

At the Commission, a three-member panel reviewed Driehaus's complaint and, in a 2-1 vote, determined that the complaint should be referred to the full Commission for further investigation. Pet. App. 4a. The panel scheduled a hearing to take place two weeks after the complaint was referred to the full Commission. *Id.* SBA List and Driehaus eventually agreed to postpone that hearing until after the

election. Pet. App. 5a. Driehaus lost his bid for reelection, and then moved to dismiss his pending complaint. *Id.* SBA List consented to the dismissal, and the complaint was dismissed. *Id.*

C. SBA List And COAST Filed Separate Actions In Federal District Court

After Driehaus's complaint was referred to the full Commission, but before those state proceedings were stayed or dismissed, SBA List sued in federal court. It sued the Commission, all of its members in their official capacities, the Ohio Secretary of State, and Driehaus. It challenged the applicable Ohio laws on First Amendment grounds. Pet. App. 4a-5a. Because of the pending state proceedings, the district court initially stayed the suit on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). Pet. App. 5a.

Separately, Petitioner Coalition Opposed to Additional Spending and Taxes (COAST) filed its own case in the same federal court. COAST had not at that time been involved in proceedings before the Ohio Elections Commission, but it nevertheless sought to challenge Ohio Rev. Code § 3517.21(B)(9) and (10). Pet. App. 5a-6a. Like SBA List, COAST wished to criticize Driehaus for voting for the Affordable Care Act on the same grounds: that the ACA provides for taxpayer-funded abortion. *Id.* In its complaint, COAST stated that it did not publish its intended message because of the complaint that Driehaus filed against SBA List. Pet. App. 6a. Although COAST's complaint acknowledged that the Commission's opinions are merely advisory (Compl. ¶ 16, ECF #1 PAGEID #4), COAST claimed that it refrained from disseminating its message because it

feared having to defend the truthfulness of that message before a government agency. Pet. App. 48a.

D. The District Court Dismissed On Justiciability Grounds, And The Sixth Circuit Affirmed

The district court consolidated the complaints and granted the defendants' motions to dismiss on standing and ripeness grounds. Pet. App. 6a. The district court dismissed SBA List's complaint because it found that there was "no evidence of imminent or actual harm, beyond SBA List's self-imposed 'chill.'" Pet. App. 34a. The court found COAST's complaint unripe because the alleged injury was based on too attenuated a chain of speculation, Pet. App. 57a, and because COAST was not facing any imminent threat of actual prosecution, Pet. App. 58a.

The Sixth Circuit, in a non-precedential decision, upheld the district court's dismissal of the complaints, finding that neither SBA List's claims nor COAST's claims were ripe for review. Pet. App. 16a, 18a. The court outlined three ripeness factors: "(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." Pet. App. 7a-8a. The court found that all three factors cut against SBA List and COAST.

First, it found "no likelihood of harm" for several reasons, primarily that SBA List did not show a credible fear of future prosecution. Pet. App. 15a-

16a. The court found it not "likely that the Commission will threaten SBA List with prosecution anytime soon." Pet. App. 12a. It explained that the particular past action was no indicator of future action, and that the Commission's past action itself was a mere preliminary step: "While it green-lighted further investigation, the Commission expressed no opinion about the application of Ohio law to SBA List's speech." *Id.* In addition, the Commission cannot initiate an action, but can only respond to complaints. *Id.* Turning to a separate step within the "likelihood of harm" factor, the court found that SBA List did not show that it intended to make false statements and thus to violate the law. Pet. App. 15a. And it found the "risk of a false prosecution" to be speculative rather than credible.

Second, and independent of any credible threat of prosecution, the court found that SBA List failed to meet the second ripeness factor, because the factual record was too undeveloped to allow for intelligent review of the First Amendment question. Pet. App. 16a. The Commission had not found that SBA List violated the law, and no criminal prosecution had occurred after any referral. *Id.* As to future speech, the court said it would need to speculate about every step, including what the future statement would be, whether anyone would complain, and whether the Commission would find a violation. *Id.* It concluded that it could not "decide SBA List's claims on [the] threadbare record without engaging in precisely the kind of conjecture that the ripeness doctrine bars." *Id.*

Third, the court found that no hardship would befall SBA List absent judicial review, as its speech had not been chilled. Pet. App. 17a. To the contrary, the record showed that SBA List "continued to actively communicate its message about Driehaus' voting record" even after he filed his complaint with the Commission. *Id.*

Finally, the court found that COAST's claims were unripe because they were "even more speculative than SBA List's." Pet. App. 18a. COAST had, at that time, never been subject to any Commission process, so its claims were unripe. *Id.* (COAST does have another case pending against the Commission, as noted below in Part II, but the claims in that case are not part of this suit.)

REASONS FOR DENYING THE WRIT

Nothing about the decision below is remarkable or otherwise deserving of review. The decision below was a routine procedural dismissal for lack of ripeness. The Sixth Circuit did not say anything in this case that would immunize the Ohio election laws at issue, Ohio Rev. Code § 3517.21(B)(9)-(10), from further review by an appropriate plaintiff. To the contrary, the Sixth Circuit has *already* found justiciable other challenges to the same or similar Ohio election laws. *See, e.g., Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 491-93 (6th Cir. 1995); *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576-77 (6th Cir. 1991). The circuit merely found that *this case* is not ripe on *these facts*.

The principal reasons against review are best understood in light of the unique nature of the Ohio

Elections Commission and its role in Ohio's false-statements law. The Commission cannot initiate investigations on the front end, nor can it prosecute or impose penalties on the back end. Instead, it merely stands in the middle, assessing statements and performing what the Sixth Circuit calls the Commission's "recommending" and "truth-declaring" functions. *Pestrak*, 926 F.2d at 578-80. Notably, the Sixth Circuit found that Petitioners did not even establish that the Commission was likely to act against them again, let alone that they faced imminent harm of criminal prosecution. Pet. App. 12a-13a.

These and other distinctions show that the decision below was not just fact-bound, but in line with all the other circuits, including the Eighth Circuit's decision in *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011). Further, under the totality of the circumstances, the decision was so narrow that it would render the case a poor vehicle for any broader assessment of ripeness in the First Amendment context, and it says nothing at all about standing. Indeed, the Petition takes issue with the ripeness factor considering the "credible threat of prosecution," but largely ignores the Sixth Circuit's analysis on the other two ripeness factors (lack of an adequate record or hardship), illustrating that the question presented would not even control the outcome here.

I. THE COURT SHOULD DENY REVIEW BECAUSE NO CIRCUIT SPLIT EXISTS

This Court's justiciability rules in the First Amendment context are well established. On one hand, a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge

a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Instead, "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

On the other, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). And First Amendment suits are not exempt from traditional ripeness rules. In other words, the "credible threat" requirement is a necessary, but not a sufficient, condition for justiciability, because prudential considerations also require a "factual record of an actual or imminent application of [a challenged statute] sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Renne v. Geary*, 501 U.S. 312, 321-22, 324 (1991) (dismissing case with an "amorphous and ill-defined factual record").

The Petition suggests that the Sixth Circuit stands alone in flouting these justiciability principles, and that its justiciability rules conflict with no fewer than seven other circuits' contrary rules. Pet. 10-25. That is simply not the case. The Sixth Circuit follows the same standards as every other circuit. The courts are merely reaching different re-

sults on different facts. This is shown first by looking at the Sixth Circuit's general cases in this area—many of which do find a justiciable controversy and many of which do not. *See* Part I.A. And it is confirmed by the other circuits' similar cases, whose outcomes are equally divergent and fact-dependent. *See* Part I.B. All of these cases are simply applying well-trodden rules to discrete sets of facts.

A. The Sixth Circuit Follows This Court's General Justiciability Standards For Assessing First Amendment Challenges

Although Petitioners argue that review is required to force the Sixth Circuit to adopt justiciability rules that are consistent with this Court's general "credible threat of prosecution" standard, they overlook one thing: It already has. In claiming otherwise, the Petition disregards Sixth Circuit decisions adopting the very rules that they advocate for in this case. The presence of Sixth Circuit cases on both sides of the issue—some finding a challenge justiciable, and some finding justiciability lacking—shows that Petitioners' arguments turn on issues of fact, not issues of law.

1. As a general matter, the Sixth Circuit has followed, and regularly applies, *Babbitt*'s justiciability rules both in the context of standing (which is not at issue here) and in the context of ripeness. Where the court has found a "credible threat of injury," the court has rejected the notion that a plaintiff must "undergo prosecution in order to obtain relief." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 582 (6th Cir. 2012). Instead, a plaintiff can establish a case's justiciability merely by alleging "'an inten-

tion to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder . . . .'" *Mich. State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1184 (6th Cir. 1986) (quoting *Babbitt*, 442 U.S. at 298) (finding standing to bring challenge to campaign-finance law where plaintiffs "demonstrated 'a realistic danger of sustaining injury' as a result of the operation and enforcement of the statute"); *see also, e.g.*, *Faith Baptist Church v. Waterford Twp.*, 522 F. App'x 322, 330 (6th Cir. 2013) ("Standing is relaxed in the First Amendment context because of a judicial prediction or assumption that the policy's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." (internal quotation marks omitted)).

A credible threat may exist against the plaintiffs, the Sixth Circuit has noted, "even if [the plaintiffs] have never been prosecuted *or threatened with prosecution*." *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012) (emphasis added). Where, for example, a municipality had "not brought an enforcement action against plaintiffs" under an ordinance restricting door-to-door solicitation, the court still found that plaintiffs had "standing to proceed on their as applied challenge" under *Babbitt*'s standards. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 240 F.3d 553, 564 n.7 (6th Cir. 2001), *rev'd on the merits by* 536 U.S. 150 (2002); *see also Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012) (finding standing for pre-enforcement First Amendment challenge to rules of the bar); *Amelkin v. McClure*, No. 94-6161, 1996 WL 8112, at *4 (6th Cir. Jan. 9, 1996)

(finding standing based on individual's desire to publish a newsletter even though he had "yet to take any significant steps toward publishing his newsletter . . .").

2. The Sixth Circuit has not only applied this Court's precedents on a credible threat of prosecution, it has also applied those precedents to find justiciable other challenges to the *same* Ohio laws that Petitioners seek to challenge here. For example, the court reached the merits of a challenge to what is now Ohio Rev. Code § 3517.21(B)(10) in *Pestrak*. There, the Commission had found that Plaintiff Pestrak, an unsuccessful political candidate, intentionally made false statements about his opponent. *See* 926 F.2d at 575. The Commission found potential violations and referred its findings to the county prosecutor, but Pestrak lost the election and no other action was taken against him. *Id.* at 576. Pestrak brought suit and the Sixth Circuit found that his claims "easily [met] [the injury] requirement for standing." *Id.* He noted that he "desire[d] to continue his political activities and that he may make other assertions that could make him the subject of action by the Commission." *Id.* at 577. Thus, relying in part on *Steffel* and *Babbitt*, the Sixth Circuit found that Pestrak's challenges to Ohio Rev. Code § 3517.21(B)(10) were justiciable. *Id.*

Indeed, it was in *Pestrak* that the Sixth Circuit invalidated the Commission's power to levy fines and issue cease-and-desist orders, *id.* at 578, while upholding what it called the Commission's "recommending" and "truth-declaring" functions, *id.* at 578-79. The court analogized the Commission's "recom-

mending" function to "a newspaper, Congressman, or private citizen urging a prosecutor to bring a certain prosecution." *Id.* at 578. It thus held that "to the extent [the Commission] does nothing more than recommend, then its actions, *per se*, have no official weight and cannot be the cause of deprivation of constitutional rights." *Id.* The court further found that, as part of its "'truth-declaring' function," the Commission merely "determines and proclaims to the electorate the truth of various campaign allegations," and it held that "the statements and findings of the Commission fall exactly within the tenet that 'the usual cure for false speech is more speech.'" *Id.* at 579-80 (quoting *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1206 n.27 (11th Cir. 1985)).

Pestrak shows that the Sixth Circuit has enacted no barrier to challenging Ohio's false-statement laws. And it shows that the Sixth Circuit is willing and able to consider Ohio's laws on First Amendment grounds in a justiciable controversy.

The Sixth Circuit allowed another challenge to Ohio's election law to proceed in *Briggs*. There, the court reviewed Ohio Rev. Code § 3527.21(B)(1) (which, at the time, was codified at 3599.091(B)(1)). The court expressly tested justiciability as a threshold, stating that "[w]hen considering Briggs's standing to bring a First Amendment challenge, however, we note that Briggs does not bear a heavy burden to 'demonstrate a claim of specific present objective harm or a threat of specific future harm.'" *Briggs*, 61 F.3d at 492 (quoting *Meese v. Keene*, 481 U.S. 465, 472 (1987)). And, citing *Steffel*, it noted that that "the reasonable threat of prosecution for conduct the

plaintiff alleges is protected by the Constitution will give rise to a sufficiently ripe controversy." *Briggs*, 61 F.3d at 493.

In sum, *Pestrak* and *Briggs*—along with many cases involving laws other than Ohio's election law—show that the Sixth Circuit follows this Court's justiciability jurisprudence, and its divergent outcomes reflect the different facts in the different cases. In other words, the Sixth Circuit has *not*, contrary to Petitioners' claim, "adopted a uniquely restrictive approach to pre-enforcement review under the First Amendment." Pet. 1-2.

B. Other Circuits Follow The Same General Test When Deciding The Justiciability Of First Amendment Challenges

Not surprisingly, other circuits, like the Sixth, apply the same tests for standing and ripeness, and, also not surprisingly, they reach decisions for and against justiciability on different facts. Given the quantity of such cases testing such procedural grounds, it is not hard to manufacture a first-blush "split." That merely reflects how fact-bound this area is. "Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . ." *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961); *see also, e.g.*, *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (noting that courts look to "a number of factors" when determining whether "'pre-enforcement plaintiffs'" can bring suit); *McCollester v. City of Keene*, 668 F.2d 617, 619 (1st Cir. 1982) (noting that "'the maturity of such disputes for resolution before a prosecution begins is decided on a

case-by-case basis'" (citation omitted)). Just as the Sixth Circuit has found justiciability in many other cases (as shown above), the other circuits have rejected justiciability in many other cases (as shown below). Taken together, those outcomes prove that Petitioners' claimed seven-to-one circuit split is illusory, both as to the general conflict, and as to the alleged specific conflict with the Eighth Circuit and its decision in *281 Care Committee*.

1. The alleged general "conflict" is no conflict at all

The circuits that allegedly conflict with the Sixth do the same as it does: apply the same Supreme Court case law, and reach different results in different cases based on different facts.

a. The Petition begins with the First Circuit. Pet. 13. But, as noted, the First Circuit has "[t]ak[en] a 'case-by-case' approach." *McCollester*, 668 F.2d at 620. So, for example, in *Ramirez v. Sanches Ramos*, 438 F.3d 92 (1st Cir. 2006), the First Circuit rejected standing claims on similar grounds. There, the challenged statute prohibited disturbing the peace with the use of force. *Id.* at 98-99. The court noted that standing "requires a credible threat—as opposed to a hypothetical possibility—that the challenged statute will be enforced to the plaintiff's detriment if she exercises her First Amendment rights." *Id.* at 98. And the plaintiff, while she had been charged with a prior violation, failed to meet this standard because she did not adequately allege that her *future* speech would fall within the law, which required the use of force. *Id.* at 98-99; *see also Osediacz v. City of Cranston*, 414 F.3d

136, 141 (1st Cir. 2005) (noting that plaintiffs in other cases that successfully asserted standing "at the very least desired or intended to undertake activity within the compass of the challenged statute").

The Sixth Circuit engaged in the same analysis when rejecting Petitioners' claims in this case. Like the plaintiff in *Ramirez*, SBA List failed to allege that its future expressive activity would disobey the Ohio election law. That law—while it did not have a force element—still required *false* statements to meet a demanding *actual-malice* test. Pet. 14a-15a. And SBA List "insist[ed] that the statement it made and plans to repeat . . . is *factually true*." Pet. App. 15a (emphasis added). So SBA List did not allege an intention to violate the statute under even an arguable interpretation of it.

The Petition next turns to the Seventh Circuit. Pet. 13. It, too, has cases in conformity with the Sixth Circuit's approach here. In *Schirmer v. Nagode*, 621 F.3d 581 (7th Cir. 2010), for example, the court distinguished two lines of cases. On the one hand, citing the Petition's cases, it noted that "when an *ambiguous* statute *arguably* prohibits certain protected speech, a reasonable fear of prosecution can provide standing for a First Amendment challenge." *Id.* at 586 (emphases added) (citing *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998)). On the other, it held that "a plaintiff lacks standing to bring a pre-enforcement challenge if the plaintiff's 'conduct was clearly outside the statute's scope.'" *Id.* at 587 (citation omitted). The court found that this

second situation applied on the complaint's allegations. Even though the government officers had previously found plaintiffs' same conduct to violate the statute, "[s]uch a clear misuse of a law does not provide a basis for a federal court to explore that law's facial constitutionality." *Id.* at 588. Here again, the Sixth Circuit noted that SBA List *insisted strongly* that its speech would be true—and thus *not* subject to the false-statement law. Pet. App. 15a.

The other circuits in the alleged split (*see* Pet 13-15) have similar cases dismissing pre-enforcement First Amendment suits on similar grounds. When dismissing one such suit, for example, the Ninth Circuit noted that its case law stood for the proposition "that pre-enforcement plaintiffs who failed to allege a concrete intent to violate the challenged law could not establish a credible threat of enforcement." *Lopez*, 630 F.3d at 787. So it dismissed a plaintiff's claim that a school district's sexual-harassment policy violated his right to speak in support of traditional marriage because the policy did not apply to that speech. *Id.* at 790-92; *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (holding that "any threat of enforcement or prosecution against the [plaintiffs] in this case—though theoretically possible—is not reasonable or imminent").

Indeed, the Second Circuit has even rejected pre-enforcement challenges when it was unclear whether a plaintiff's intended conduct was covered by the challenged policy. *See Marchi v. Bd. of Cooperative Educ. Servs. of Albany*, 173 F.3d 469, 477-79 (2nd Cir. 1999). In *Marchi*, the court considered, among

other things, a teacher's argument that a school board's policy limiting the teacher's religious speech to students while off-campus violated his free-speech rights. *Id.* at 477-78. The court found the claim unripe because it was unclear how or even whether the policy would apply in that context. *Id.* at 478.

Finally, the D.C. Circuit—the last circuit in the alleged general split (Pet. 15)—has stated that "'chill' alone will not suffice to confer standing on a litigant bringing a pre-enforcement facial challenge to a statute allegedly infringing on the freedom of speech." *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1194 (D.C. Cir. 1992). And it has dismissed a pre-enforcement challenge as non-justiciable because there was "nothing in the complaint or in plaintiffs' affidavits to indicate why [the challenged] provisions will be applied to them in the foreseeable future." *Id.* at 1196-97.

As all of these countervailing cases show, whether a pre-enforcement challenge is proper depends on the specific facts of each case. That these circuits have reached different outcomes from the cases cited in the Petition is not evidence of a large intra-circuit split in each circuit, but merely evidence of different facts resolving different cases.

b. Against this backdrop, a close examination of Petitioners' cases shows that those cases, too, are distinct from this one, confirming that the "conflict" is illusory. Several major factual differences, in varying combinations, explain the outcome differences between this case and those.

First, in most of the Petition's cases, the relevant statutes contained bright-line rules and the plaintiffs expressed an unambiguous desire to cross those rules. *See, e.g., Az. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1004 (9th Cir. 2003) (challenging law unambiguously requiring advance notice before distributing political literature); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 379 (2nd Cir. 2000) (challenging unambiguous campaign-finance requirements); *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 34 (1st Cir. 1999) (challenging law prohibiting "an activity plainly proscribed by the text"); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (challenging law whose "plain language" prohibited speech); *Commodity Trend*, 149 F.3d at 687 (challenging law whose "broad sweep" covered the trading advice at issue); *see also Seegars v. Gonzales*, 396 F.3d 1248, 1252 (D.C. Cir. 2005) (stating that a credible threat requires that "plaintiffs' intended behavior [be] *covered by the statute* . . ." (emphasis added)).

That is simply not alleged here. Petitioners indicate that their future speech will be *true* and will not fall within Ohio Rev. Code § 3517.21(B). They stated their unambiguous intent to make truthful statements about a candidate's voting record, but that is not prohibited by Ohio law—not even "arguably" so. *See* Pet. App. 15a. Ohio law bars only campaign-related statements that are *false* and only when made with *actual malice*. *See* Ohio Rev. Code § 3517.21(B); *see also McKimm*, 729 N.E.2d 373-75. As such, unlike in these other cases, Petitioners have simply not expressed a desire to engage in speech that violates the law. *See* Pet. App. 14a-15a.

Second, Petitioners cannot overcome this clear distinction by pointing to cases applying the "arguably" standard, and saying that their speech here would "arguably" fall within the Ohio law. *See, e.g.*, *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996) (finding that intended speech "arguably fall[s] within" the statute); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (finding intended speech "arguably subject" to the statute's reach"). The "arguably" standard rests on the notion that a statute's *vague* language might make it *unclear* whether the statute prohibits a plaintiff's proposed speech. *Schirmer*, 621 F.3d at 586 (noting that a reasonable fear of prosecution might exist "when an *ambiguous* statute *arguably* prohibits certain protected speech" (emphasis added)). Here, by contrast, Petitioners fail to identify any ambiguity in the laws. None of Petitioners' *allegedly true* speech could "reasonably be construed" to be covered by a statute covering *false* speech. *Ramirez*, 438 F.3d at 99.

Instead, Petitioners glide from the "arguably" standard to a very different one—that the Commission will find them in violation under a "false prosecution," Pet. App. 15a, *i.e.*, that the Commission will investigate their statements even though the statements fall *outside* the statute. No circuit has ever adopted that standard, allowing justiciability based on some showing that an agency will prosecute beyond the bounds of law. Indeed, the Seventh Circuit has expressly rejected it. *See Schirmer*, 621 F.3d at 587-88; *see also Glenn v. Holder*, 690 F.3d 417, 422 (6th Cir. 2012); *PETA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002). Nor would that standard

make sense for challenging a statute *facially*—as compared to challenging the agency's application of it *as applied*. The problem in such a scenario would not be the *law*, even in its "arguable" reach, but an agency's *actions* outside the law. Thus, Petitioners here, since they do not claim that their speech falls "arguably" under a vague statute, are not similar to those plaintiffs in other circuits whose speech did so.

Third, in many if not most of the Petition's cases, the plaintiffs alleged that they changed their speech because it objectively fell within the four corners of the statute. *See, e.g.*, *Az. Right to Life*, 320 F.3d at 1004 (plaintiff "was forced to modify its speech and behavior to comply with the statute"); *N.C. Right to Life*, 168 F.3d at 711 (one plaintiff "discontinued distributing its voter guide and [another] . . . stopped soliciting without providing a disclaimer"); *R.I. Ass'n*, 199 F.3d at 34 (plaintiff "refrained from carrying forward its plan"). In this case, by contrast, SBA List never established that it suffered any such harm. Pet. App. 9a-10a. The SBA List proceedings before the Commission were dismissed, Pet. App. 5a, and the billboard rejection resulted from an independent third party; it was not attributable to any state statute, Pet. App. 10a. As the court below found, SBA List was not "deterred from engaging in the very conduct that it claims is encumbered." Pet. App. 18a. As for COAST, any alleged changed speech resulted from a subjective chill, not an objective one, since it had never even been involved in any commission proceedings. *Id.*

Fourth, in all of the Petition's cases, the plaintiffs brought suit against those who imposed the threat of

prosecution of the challenged law. *See, e.g.*, *Cal. Pro-Life Council*, 328 F.3d at 1092 (plaintiff seeking that state agency "be enjoined from enforcing the alleged unconstitutional provisions"); *N.C. Right to Life*, 168 F.3d at 709 (plaintiff suing county prosecutor). Here, however, Petitioners did not—and could not—face a credible threat of prosecution from the *named defendants*. The Sixth Circuit found that even the threat of future commission action was not concrete. Pet. App. 8a-14a. But even if commission action had been likely, that would not amount to a "prosecution," or even to a coercive civil action for fines or penalties. The Commission has no prosecutorial power, no power to impose fines, and no power to issue cease-and-desist orders. *See Pestrak*, 926 F.2d at 578-80; Ohio Rev. Code § 3517.153; Ohio Rev. Code § 3517.155(D)(2). Instead, the Commission may only investigate and refer cases. But since Petitioners seek to prevent enforcement of the *substantive provisions* of Ohio Rev. Code § 3517.21(B), not the Ohio Elections Commission's *procedures*—they challenge the wrong parties.

2. The Eighth Circuit's decision in *281 Care Committee* relied on facts distinct from this case

The Petition cites Eighth Circuit cases—and in particular its decision in *281 Care Committee*—as the centerpiece of its alleged "split," charging that this decision reaches a different outcome "on nearly identical facts." Pet. 23. Not so.

As a general matter, many decisions from both circuits, including the decision below and *281 Care Committee*, cite the same standards. The Sixth Cir-

cuit, for example, relied almost entirely on *United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988), when holding that particular plaintiffs had standing to challenge campaign-finance laws. *See Frank v. City of Akron*, 290 F.3d 813, 816 (6th Cir. 2002). The Sixth Circuit noted that "where 'plaintiffs allege an intention to engage in a course of conduct arguably affected by [a] statute, courts have found standing to challenge the statute even absent a specific threat of enforcement.'" *Id.* (quoting *United Food*, 857 F.2d at 428). That same Eighth Circuit case figures prominently in *281 Care Committee*. *See* 638 F.3d at 628, 630. Such overlapping citations emphasize that these circuits are in accord on matters of law.

As a specific matter, *281 Care Committee* and this case diverge based on the specific conclusions in each case. For one thing, the Eighth Circuit found that the plaintiffs in *281 Care Committee* "have been chilled from, and continue to be chilled from, vigorously participating in" a particular debate. 638 F.3d at 626. In this case, by contrast, the Sixth Circuit noted that "SBA List's conduct after Driehaus filed the complaint in 2010 suggests that its speech has *not* been chilled." Pet. App. 17a (emphasis added). As noted, the *only* form of speech that was limited was the cancelled billboard—which happened because of private actors—and SBA List otherwise "continued to actively communicate its message about Driehaus' voting record." *Id.* Indeed, the Sixth Circuit quoted SBA List's president's commitment to "double down" on more speech and to "make sure that our message floods [Driehaus's] district,"

and it concluded that "[t]his is not the sound of chilled speech or a silenced speaker." *Id.*

For another, the Eighth Circuit noted that the plaintiffs in *281 Care Committee* "*have* alleged that they wish to engage in conduct that could reasonably be interpreted as making false statements with reckless disregard for the truth of those statements." 638 F.3d at 628; *see id.* at 630 (noting that plaintiffs alleged that they wanted "to make arguments that are not grounded in facts"). In this case, by contrast, the Sixth Circuit held that similar allegations were lacking, noting that "SBA List [did] *not* say that it plans to lie or recklessly disregard the veracity of its speech." Pet. App. 15a (emphasis added).

The test here requires a showing both that the plaintiff has been reasonably chilled and that plaintiff's conduct would arguably violate the law. The Sixth Circuit found both factors lacking, whereas the Eighth Circuit found both factors met. Petitioners might disagree with the soundness of the Sixth Circuit's conclusion in these regards, but that desire for fact-bound error-correction does not mean that the Eighth and the Sixth Circuits conflict on the law. These different outcomes based on different facts do not create a split.

Aside from these specific facts, this case is distinguishable from *281 Care Committee* on the same grounds that the Eighth Circuit itself has relied on to distinguish its cases. *See Eckles v. City of Corydon*, 341 F.3d 762, 768-69 (2003). In *Eckles*, the court found no credible threat of prosecution by a county even though its attorneys had sent letters suggesting that the plaintiff's conduct "*could*" result in enforce-

ment action under city or state ordinances. The court found that these alleged "threats were not concrete nor particularized, not actual nor imminent, but merely conjectural or hypothetical." *Id.* In particular, there was no evidence that the county defendants "possessed the authority to *enforce the City or State ordinances.*" *Id.* at 769 (emphasis added). On that basis, the court concluded that the plaintiff could not "establish that [he] was threatened with harm" *by the defendants. Id.*; *see St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 n.4 (8th Cir. 2006) (distinguishing *Eckles* on ground that the present plaintiffs "brought suit *against those with the authority to enforce* [the challenged statutes]" (emphasis added)).

This case is distinguishable from *281 Care Committee* on the same basis. The plaintiffs there sued the *actual prosecutors* with authority to bring actions against them under the Minnesota law. *See* 638 F.3d at 625. Minnesota has an administrative agency, the Office of Administrative Hearings, that first hears civil claims regarding that law. *Id.* Then, "county attorneys have discretion to determine whether to bring criminal charges after civil proceedings are complete." *Id.* The plaintiffs sued those attorneys, and did not even bother to sue the Minnesota administrative agency. While the Eighth Circuit did not discuss this distinction, it had no need to do so because the suit against the prosecutors eliminated any such justiciability concerns. But had the plaintiffs sued only individuals with *no* enforcement power, the outcome could easily have been different, as shown by *Eckles* and *St. Paul Area Chamber*.

The importance of this distinction is heightened by the Sixth Circuit's own analysis, which repeatedly *highlighted* the Ohio Elections Commission's limited role. *See* Pet. App. 4a ("A word about the Commission's procedures is critical to understanding what happened next."); *id.* (outlining different steps by complainants, the Commission, and prosecutors); Pet. App. 16a ("The Commission has not found that SBA List violated the false-statement law. And no prosecutor has taken any action upon any Commission referral."). It is also illustrated by another Respondent in this case—*private* Respondent Driehaus. Just as the Commission can only refer to actual prosecutors, he could only complain to the Commission and is one further step removed from any prosecution. Surely a claim challenging the enforcement of a state statute against only a *private* party is not justiciable. And once the lack of a case against Driehaus is clear, the lack of a case against the Commission follows, for, in the end, it merely refers prosecutors the case, leaving it to them to enforce the statute challenged here. *See Eckles*, 341 F.3d at 768.

II. THIS CASE IS A POOR VEHICLE TO CONSIDER THE ISSUES PRESENTED

The Court should lastly deny review because this case presents a poor vehicle for considering any broad justiciability principles. *First*, at bottom, the Petition raises the question of what must be proved to illustrate a credible threat of prosecution. Pet. 10. But this is a ripeness case. The Sixth Circuit did not simply rely on its finding that Petitioners could not "demonstrate[] an imminent threat of prosecution" under the likelihood-of-harm factor. Pet. App. 15a.

It also found that the other ripeness factors were not met—namely, that there was an inadequate factual record to resolve any challenge and that Petitioners had failed to establish any hardship. *Id.* at 16a-18a. Many of the justiciability cases in this area, by contrast, are resolved as a matter of standing—turning largely on the credible-threat factor alone and not on ripeness's more discretionary factors. *See, e.g.*, *Vt. Right to Life Comm.*, 221 F.3d at 381-84 (considering only standing question whether plaintiff "face[d] a 'credible threat' . . . of being penalized for its speech" (citation omitted)). Thus, to the extent the Court wants to weigh in on the question presented, it should wait for a standing case that raises it in a more concrete and outcome-dispositive way.

Second, the Ohio Elections Commission's limited role—declaring its own assessment of statements and making referrals—makes this case unlike any other case cited in the Petition. While other cases explain that the "fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution," *id.* at 382, no case involves a "prosecution" that includes no civil penalties or other criminal enforcement, but merely a "recommendation" and an opinion on the truth of the party's statements. The Commission's limited role in enforcing the statute, therefore, also makes this case a unique one, and further illustrates that the case provides a bad vehicle for resolving any potential disagreement in the courts on the question of what qualifies as a credible threat of prosecution.

Third, the unique nature of Petitioners' claims also shows that this case is not suitable to resolve any

general issues. As noted, they allege that the Commission might falsely prosecute them by going plainly beyond the statute's scope, as opposed to claiming that their future speech would legitimately be in the statute's "arguable" scope. *See* Pet. App. 15a. These allegations, too, render this case unique, and thus a poor vehicle to address a category of cases or provide guidance of value beyond this one.

Fourth, as explained above, the Sixth Circuit has already adopted all of the legal tests that Petitioners urge, and the circuit has done so in reported cases, so an alleged application error in this unreported decision does not even bind the Sixth Circuit. If anything, the Petition alleges an intra-circuit problem, which is best addressed en banc. Indeed, COAST has an en banc request pending in a separate case also challenging the same Ohio election law—because a different panel in that case rejected justiciability for lack of standing. *See Coast Candidates PAC v. Ohio Elections Comm'n*, __ F. App'x. __, 2013 WL 4829216, at *8 (6th Cir. Sept. 11, 2013). While proceeding on standing rather than ripeness, the court's reasoning on the credible-threat factor was somewhat similar to the decision below, and the en banc request provides an opportunity for the Sixth Circuit to clarify its view if it thinks there is any conflict between these unpublished decisions and broader justiciability principles. (In the interest of disclosure, it should be noted that, in that case, the Attorney General of Ohio submitted in the district court an independent *amicus* brief questioning, on the merits, the constitutionality of the generalized false-statements subsections of Ohio's election law. *Id.* at

*8 n.5. But that brief did not take a position on the procedural issue there.)

All of these reasons show that this was, again, a fact-bound application of settled law, and this case's unique context makes it a poor vehicle to review any broader justiciability principles.

CONCLUSION

For the above reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for State Respondents

NOVEMBER 27, 2013

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 11 2013
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No. 13-193

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

DAVID R. LANGDON
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan Street
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

CHRISTOPHER P. FINNEY
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Ave.
Cincinnati, OH 45208

Counsel for Petitioners

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Law Library

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In *United States v. Alvarez*, 132 S. Ct. 2537 (2012), all Justices agreed that proscribing "false" political speech would pose grave constitutional concerns. Four Justices wrote that "[t]he mere potential for the exercise of that power casts a chill" that "the First Amendment cannot permit." *Id.* at 2548 (plurality). Two warned that, in "the political arena," the "criminal prosecution [of falsity] is particularly dangerous," because it "can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." *Id.* at 2553, 2556 (Breyer, J., concurring in judgment). And the three dissenters agreed that, as to "matters of public concern," "any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 2564 (Alito, J., dissenting).

In Ohio (as in many other states), knowing or reckless false statements about political candidates or ballot initiatives are *criminally* prohibited. Yet under the warped justiciability principles repeatedly applied by the Sixth Circuit, it is *impossible* for a speaker suffering precisely the "chilling" of speech that *Alvarez* warned about to seek judicial review. The Commission openly concedes that Catch-22: Its defenses of the decision below plainly preclude *any* pre-enforcement challenge, no matter how clear that the speaker would face enforcement action, unless it is *undisputed* that the intended speech is knowingly false and thus concededly unlawful. The Sixth Circuit and Commission therefore agree that review may be sought only after the speaker is *actually found guilty* (or confesses). Every Sixth Circuit case the Commission cites fits that pattern.

That is not the law anywhere else. No other Circuit has held that, so long as a *speaker* maintains his innocence, pre-enforcement review is barred, even if *enforcement authorities* will likely prosecute the speech. No other Circuit has held that chill is "subjective" unless it is *certain* that such prosecution would *succeed*, even if the prosecution is objectively likely (or certain). And no other Circuit has held that burdensome enforcement actions are not injury unless a criminal prosecution results. Accordingly, the cases that the Commission cites as purportedly agreeing with the decision below do nothing of the sort. They all involved situations where the speech carried *no* risk of *any* adverse state action—because *there was no dispute at all* that the speech was *lawful*. Here, in stark contrast, the Sixth Circuit precludes challenges even where adverse state action is likely or even certain; allowing them only when *conviction* is certain (either because the speaker has preemptively confessed or because the same speech has been finally resolved to violate the statute). Far from dissolving the conflict of authority, these cases place it into sharp relief.

In short: If intended speech is clearly unlawful, all courts allow review. If it is clearly lawful, all courts bar review. The conflict is over situations of *uncertainty*, where the speaker reasonably fears enforcement. In this case, the Commission found Petitioner's criticism of a Member of Congress's vote for the Affordable Care Act to be "probably" criminal. That would have authorized pre-enforcement review anywhere else, but the Sixth Circuit held that those who wanted to engage in that speech first had to be fined or jailed. That ought to strike anyone familiar with the First Amendment as an outrage, but it will

assure the perpetuation of Ohio's censorious regime (and the clear Circuit split) unless this Court intervenes.

I. THE COMMISSION CONFIRMS THE CATCH-22 CREATED BY THE SIXTH CIRCUIT'S WARPED APPROACH TO JUSTICIABILITY.

As Petitioners have explained, by precluding challenges to speech-suppressive laws unless the plaintiff's speech is *clearly* proscribed or has *already* been found unlawful, the Sixth Circuit creates a Catch-22: If a speaker refrains from engaging in core political speech due to a reasonable fear of facing enforcement proceedings, he cannot challenge the regime chilling his First Amendment conduct. Only if the speaker chooses to run that risk, is subjected to distracting, costly enforcement proceedings during the critical campaign period when the speech has value, *and is ultimately found guilty*, may a challenge be pursued. That untenable approach has resulted in the decades-long perpetuation of Ohio's abusive regime, which even the State's own Attorney General has admitted is unconstitutional (Opp. 32). The Commission's opposition confirms this Catch-22, underscoring the need for this Court's intervention.

A. The Commission offers three defenses of the decision below. *First*, Petitioners never admitted that their statements were false, and so purportedly cannot claim to face a threat of prosecution. *Second*, any chill they suffered was allegedly "subjective," since no final determination had been reached on their guilt. *Third*, the Commission can compel speakers to defend their speech in an adjudication and then recommend prosecution, but cannot impose other penalties itself.

We explain below why those grounds are legally erroneous and contradict decisions of other Circuits. But, at the outset, it is important to recognize that they would preclude pre-enforcement review in *any* challenge to Ohio's false-statement law. No speaker would ever preemptively deprive his speech of all persuasive force (and confess a criminal violation) by attesting that he intends to intentionally lie. If the chill here was merely "subjective," notwithstanding the Commission's probable-cause finding about the *same* speech, nothing short of a conviction could ever make chill sufficiently "objective" to be actionable. And the Commission may never impose penalties.

On the Commission's own theory, therefore, a speaker who wants to engage in speech that he believes to be truthful could *never* challenge the false-statement law—no matter how likely it is that his speech would result in complaints, expense, distraction, prosecution, or conviction; and no matter whether those risks indisputably chill his core political speech.

B. Indeed, that conclusion is confirmed by the two cases cited as proof that the Sixth Circuit *does* sometimes review the Commission. (Opp.16-18.) In *Pestrak v. Ohio Elections Commission*, 926 F.2d 573, 576-77 (6th Cir. 1991), the plaintiff was "charged and investigated," and the Commission "recommended his prosecution." In *Briggs v. Ohio Elections Commission*, 61 F.3d 487, 490 (6th Cir. 1995), the Commission "found Briggs guilty of violating the statute." These cases thus prove Petitioners' point: In the Sixth Circuit, a speaker must be found guilty *before* he may seek judicial review.

C. That is entirely untenable. Being dragged before state officials or subjected to criminal prosecution are obviously burdens standing alone and, combined with the risk of criminal penalties, will greatly deter most speakers. The Sixth Circuit's approach thus guarantees that truthful speech will be substantially chilled. Indeed, the Commission affirmatively promotes this chill, boasting on its website that "campaigns and their consultants will continue to hone their messages in an attempt to work carefully around the Commission." *Ohio Elections Commission: History*, http://elc.ohio.gov/History.stm. Moreover, even bold speakers willing to run these risks are often deprived of review, because political opponents quietly drop their complaints after the campaigns, having already harassed their critics and obtained politically valuable probable-cause findings. (Pet.34-35.) Again, the Commission concedes this abuse, admitting that campaigns often "use the Commission as a part of their activities." *Id.*

Absent this Court's intervention, a law that even Ohio's Attorney General believes unconstitutional will thus continue to burden core political speech in a battleground state. That is reason enough to grant review—now, before the 2014 elections.

II. THE SIXTH CIRCUIT APPROACH SQUARELY CONFLICTS WITH OTHER CIRCUITS'.

Given its perverse consequences, it is no surprise that the Sixth Circuit's approach is contrary to that of at least seven other Circuits. The Commission's finding that SBA's speech was probably criminal would have sufficed anywhere else for Petitioners, who wanted to repeat the *same* speech, to pursue their challenge. The Sixth Circuit is a clear outlier.

A. Whether Speakers Maintain Their Innocence Is Irrelevant to Justiciability, and No Other Circuit Has Ever Held Otherwise.

The Commission contends that Petitioners cannot sue because they maintain that their speech "will be *true*." (Opp.23.) But the *speakers'* view is irrelevant to whether they credibly fear prosecution. The latter obviously turns on what *enforcement authorities* think, which is precisely why the correct standard is whether the intended speech "arguably" runs afoul of the law, as the Commission concedes. (Opp.24.) It would be ironic indeed if those who are chilled from engaging in *truthful* speech were barred from the courthouse, even though these laws raise constitutional concerns *precisely because* they chill true speech. *Alvarez*, 132 S. Ct. at 2548 (plurality); *id.* at 2553 (Breyer, J.); *id.* at 2564 (Alito, J.).

The Eighth Circuit flatly rejected this reasoning in *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), involving an indistinguishable law. There, "plaintiffs [did] not alleg[e] that they wish to knowingly make false statements of fact." *Id.* at 628. That did not matter: "A First Amendment plaintiff does not always need to allege a subjective intent to violate a law in order to establish a reasonable fear of prosecution." *Id.* at 629. It sufficed that, "in the political-speech arena," determining truth "often proves difficult"; plaintiffs presented a "reasonable worry that state officials ... will interpret [their] actions as violating the statute." *Id.* at 629-30. *Accord Mangual v. Rotger-Sabat*, 317 F.3d 45, 58-60 (1st Cir. 2003) (allowing challenge where plaintiff did not intend to commit criminal libel). Thus, there is a clear Circuit split on the *precise* issue presented.

Indeed, no court has ever held that the speaker's profession of innocence is dispositive of justiciability. In all the Commission's cited cases, challenges were dismissed because *nobody* thought the intended speech was unlawful. Critically, all of them looked to the *enforcement authorities'* views as to whether the conduct fell within the prohibition—an inquiry that is irrelevant in the Sixth Circuit's view. These cases thus *confirm* the conflict. *See Lopez v. Candaele*, 630 F.3d 775, 786-90 (9th Cir. 2010) ("preliminary efforts to enforce a speech restriction" would be "strong evidence" of "credible threat," but dismissing because sexual harassment policy did not "even arguably appl[y]" to speech criticizing same-sex marriage, and "[n]o [school] official" ever suggested otherwise); *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 99 (1st Cir. 2006) (plaintiff planned peaceful activities not "even arguably within the statute's reach"; she had been prosecuted when she "*used force*," but had "no intention of engaging in similar conduct" again); *Schirmer v. Nagode*, 621 F.3d 581, 586-87 (7th Cir. 2010) (agreeing that "uncertainty is particularly problematic in the realm of free speech, given the danger that vital protected speech will be chilled," but dismissing injunctive claim since plaintiffs were baselessly arrested in an "isolated misuse" of law they plainly did not violate); *PETA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002) (same; defendants agreed they had "misinterpreted" law); *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1192-93 (D.C. Cir. 1992) (question is "how likely it is that the government will attempt to" enforce statute against plaintiffs; and nobody thought it would); *see also Osediacz v. City of Cranston*, 414 F.3d 136, 142 (1st Cir. 2005) (no standing to challenge displays policy

where plaintiff "d[id] not assert that she ha[d] any interest in erecting a display").[1]

Here, the Commission *already found* that Petitioners' speech is probably criminal, providing "strong evidence" of a "credible threat." *Lopez*, 630 F.3d at 786-87. Unlike the cases above, the Sixth Circuit did not say that Petitioners' speech would be lawful—only that *Petitioners* so maintained, and that the Commission had not made a *final* contrary finding. Thus, Petitioners' speech at least "arguably" violated the law, which is the standard in all other Circuits, without any requirement that the speaker confess a violation. Indeed, the very reason for the doctrine is to resolve "uncertainty" that chills speech. *Schirmer*, 621 F.3d at 586. While the Commission absurdly suggests that its "false statement" law establishes a "bright-line rule" (Opp.24), the fundamental problem with penalizing false political speech is, of course, that it forces courts to be arbiters of the impossibly vague, open-ended concept of political "truth." (*E.g.*, Pet.32-33.)

The Commission's cases thus actually confirm the conflict in how courts address justiciability in this substantial category of cases.

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[1] The Commission also cites cases in which plaintiffs had not even identified specific conduct they intended to engage in; obviously, they could not have reasonably feared prosecution. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (en banc); *Marchi v. Bd. of Co-op. Educ. Servs.*, 173 F.3d 469, 478 (2d Cir. 1999).

B. If Speech Is Chilled by a Reasonable Fear of Prosecution, That Is Cognizable Injury, and No Other Circuit Has Ever Held Otherwise.

The Commission also suggests that the decision below can be reconciled with governing law because Petitioners were purportedly not chilled by the false-statement law. That is nonsense.

It is *undisputed* that COAST was chilled by the Commission's probable-cause finding about its intended speech. The lower courts simply held that its chill was insufficient, because it had never been subjected to enforcement proceedings. (Pet.App.18a, 57a; Opp.25.) That makes COAST *identical* to the plaintiffs in *281 Care*, 638 F.3d at 626, as well as the other cases that the Commission seeks to distinguish on this ground. (Opp.25, 27.) Those other Circuits found chill cognizable in those cases because it was reasonable to fear adverse action, even though those plaintiffs (like COAST) had not yet been subject to enforcement. As all other Circuits understand, if the goal is avoiding chill, requiring the speaker to have been previously convicted makes no sense.

SBA was also in an identical situation to COAST once the proceedings against it were dismissed. It wanted to repeat the *same* speech in subsequent elections, but was chilled due to the Commission's past enforcement. (Pet.29 n.1.)

C. Being Haled Before State Officials To Defend Speech Is an Additional, Distinct Injury, and No Other Circuit Has Ever Held Otherwise.

Finally, the Commission contends that because it can force speakers to participate in adjudications to resolve the truth of their political speech, but can ultimately only recommend prosecution, justiciability

analysis is somehow altered. (Opp.11.) But no other court has ever hinted at anything along those lines. That Ohio's regime allows speakers to be not only criminally prosecuted, but also *further* penalized through costly, burdensome enforcement actions, hardly creates *less* of an injury.

To the contrary, being compelled to participate in this process—the Commission can issue subpoenas, order discovery, and seek contempt to enforce orders, *see* Ohio Rev. Code § 3517.153(B); Ohio Admin. Code § 3517-1-11(B)(3)—presents an *additional* burden on speech, which would suffice as injury even if no criminal penalties were possible. After all, even the Commission's cases agree that "[t]he threatened state action need not necessarily be a prosecution." *Lopez*, 630 F.3d at 786. And the other Circuits hold that exposure to a burdensome proceeding is *itself* injury, whether or not penalties are imposed. *E.g.*, *Mangual*, 317 F.3d at 59 ("credible fear of being haled into court ... is enough ..., even if it were not likely that [he] would be convicted"); *Am. Library*, 956 F.2d at 1193 (injury if state will "attempt to use" law against plaintiff).

Consequently, the suggestion that Petitioners erred by not suing *prosecutors* is utterly meritless. Enjoining the Commission would prevent it from imposing the above burdens on petitioners—and it would also protect them from criminal charges, because without a recommendation from the Commission, prosecutors cannot proceed. Ohio Rev. Code § 3517.21(C). This case is thus even more clearly justiciable than *281 Care*, where enjoining prosecutors would not have stopped civil suits. *See* 638 F.3d at 631.

D. There Is No Doubt About the Sixth Circuit's Position on the Questions Presented.

Despite the Commission's attempts to muddy the waters on the Sixth Circuit's position, there is no doubt about its approach. Notably, the Commission does not even try to explain the other decisions that Petitioners cited to prove the split. *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955 (6th Cir. 2009); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002). That unbroken line of decisions established the relevant principles so firmly that the court did not even publish the decision below. Nor did it publish *COAST Candidates PAC v. Ohio Elections Commission*, No. 12-4158, 2013 WL 4829216 (6th Cir. Sept. 11, 2013), which recently reconfirmed the Circuit's restrictive rules by rejecting yet another challenge to the false-statement law. En banc review was denied there on December 4, 2013. (*Cf.* Opp.32.)

In all the Sixth Circuit cases the Commission cites, the speech was *indisputably* proscribed, either because the law's scope was clear, *e.g.*, *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 582 (6th Cir. 2012); *McGlone v. Bell*, 681 F.3d 718, 730 (6th Cir. 2012); *Mich. State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1184 (6th Cir. 1986), or (as in *Pestrak* and *Briggs*) because the relevant authorities had *already* found that it was illegal, *e.g.*, *Berry v. Schmitt*, 688 F.3d 290, 295-97 (6th Cir. 2012). Again, this *highlights* the conflict: The Sixth Circuit only allows pre-enforcement review if the intended speech is *clearly* proscribed—not, unlike all other courts, when "arguable" proscription causes chill.

III. THIS CASE IS A PERFECT VEHICLE.

The Commission suggests that this case is a poor vehicle because the decision below purportedly also rested on "other ripeness factors." (Opp.31.) But those factors were wholly dependent on the Circuit's meritless notion that only certain conviction creates "objective" chill. The court found no hardship since Petitioners purportedly lacked "objective fear of future enforcement." (Pet.App.17a.) And it held the factual record inadequate because "[t]he Commission has not *found* that [Petitioners] violated the ... law." (Pet.App.16a (emphasis added).) Anyway, *281 Care* considered the same factors yet reached the opposite result. 638 F.3d at 631. So even if these factors played a distinct role, there is still a direct split as to their application here.

This case is actually a perfect vehicle, because it vividly illustrates why laws barring "false" speech can nonetheless be politicized, manipulated, and abused, thereby causing profound harm to truthful speakers—and the entire democratic process.

Respectfully submitted,

DAVID R. LANGDON
LANGDON LAW LLC
8913 Cincinnati-Dayton Road
West Chester, OH 45069

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan Street
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

CHRISTOPHER P. FINNEY
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Ave.
Cincinnati, OH 45208

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-193

Supreme Court, U.S.
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In the Supreme Court of the United States

SUSAN B. ANTHONY LIST, ET AL.,
Petitioners,

v.

STEVEN DRIEHAUS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE 1851 CENTER FOR CONSTITUTIONAL LAW, CLUB FOR GROWTH, BOB MCEWEN, WILLIAM YARBROUGH, ALAN AND DEBORAH WILSON, LEE SPEIDEL, STEPHAN LOUIS, JOHN MCCOMB, AND KATHY MAGDA IN SUPPORT OF PETITIONERS

Maurice Thompson
1851 Center for
Constitutional Law
208 E. State Street
Columbus, Ohio 43215
614-340-9817
MThompson@OhioConstitution.org

Counsel for Amicus Curiae
1851 Center for
Constitutional Law

Gregory A. Keyser
Counsel of Record
6657 Hitching Post Lane
Cincinnati, Ohio 45230
859-630-8079
gregkeyser@gmail.com

Counsel for Amicus Curiae
Club for Growth

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTIONS PRESENTED

I. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would successfully prosecute him for that speech, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

II. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false statements" in elections are not subject to pre-enforcement review under the First Amendment so long as the speaker maintains that its speech is true, even if even if others who may enforce the law disagree?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is found at 2013 WL 1942821. Two opinions of the United States District Court for the Southern District of Ohio that dismiss complaints filed by each of the two Petitioners is found at 805 F.Supp.2d 412 and 2011 WL 3296174.

IDENTITY AND INTEREST OF AMICI[1]

The Amici Curiae for whom this Brief is submitted are 1851 Center for Constitutional Law, an Ohio non-profit corporation formed to promote and protect constitutional, human and civil rights, the Club for Growth, a 501c(4) entity organized to educate and advocate in support of American economic growth and founding constitutional principles, and numerous individual Ohio citizens who, in the course of attempting grass-roots level participation in their local government, have been hauled before the commission by a political opponent in response to their clearly-protected political speech (Congressman Bob McEwen, former Congressional candidate William Yarbrough,

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[1] Counsel of record for all parties received notice of the amici curiae intention to file this brief. The parties have consented to the filing of this brief. Pursuant to Rule 37.6 of this Court, amici curiae certify that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, and its counsel made such a monetary contribution to its preparation or submission.

Alan and Deborah Wilson, Lee Speidel, Stephan Louis, John McComb, and Kathy Magda).

Each of these Amici share an abiding interest in the preservation of founding constitutional principles of freedom of political speech. They believe that free and robust political expression is fundamental to the proper operation of a democratic society, and to a fair and inclusive economy in a democratic nation. In this case, each Amici believes the constitution, and the American people, are served by protecting free political debate from content-based restriction such as Ohio's peculiar statutory scheme that appoints panels of bureaucrats as arbiters of the truth of political statements, and removes such inquiry from a public marketplace of ideas. The notion of such an Orwellian scheme is antithetical to the Constitution's guiding principles of self-governance, individual liberties and, particularly, freedoms to both speak and hear political expression.

The Amici also share an interest in fostering the protection of fundamental constitutional protections by promoting review of government laws or other restrictions that threaten the free exercise of constitutional rights. Each Amici believes that refusal to review the constitutionality of a governmental restriction criminalizing certain political speech effectively extinguishes that right. Requiring a citizen to submit to criminal prosecution in order to test a statute's constitutionality has the effect of discouraging the free exercise of constitutional rights, especially including open political debate.

Of course, the Amici encourage the Court to accept this case, to protect the free exercise of political

discourse as urged by the Petitioners, and to settle the law of the Circuits in a way that permits citizens to vindicate First Amendment protections without the need to invite a criminal conviction.

STATEMENT OF THE CASE AND FACTS

A. Ohio's Criminalization of Political Speech and Erection of an Administrative Commission to Oversee Enforcement

Under Ohio law, a citizen who knowingly or recklessly publishes a false statement about a political candidate commits a crime punishable by a prison term and fine of up to $5,000. Ohio Rev. Code §§ 3517.21(B), 3517.992(V).

The law's suppression of political speech is made robust by a private enforcement mechanism. A person aggrieved by an allegedly false political statement may file a complaint with the Ohio Elections Commission ("the Commission"), a seven-member board of political party affiliates appointed by elected officials – this is the exclusive procedure to enforce § 3517.21(B). Ohio Rev. Code §§ 3517.21(C); 3517.152(A). The complaint must complete an administrative/political review before it is considered by a prosecutor.

For complaints raised within 60 days of an election, a 3-member panel of the Commission conducts an expedited hearing to determine whether probable cause supports referring the complaint to the full Commission. Ohio Rev. Code §§ 3517.154, 3517.156. If the panel dismisses the complaint, the complainant may ask the full Commission to reconsider. On the

other hand, if the panel finds probable cause of a violation, the full Commission *must* hold a *second* hearing - - on the merits - - within 10 days, unless the parties agree to extend the time. Ohio Rev. Code § 3715.155. The Commission may request an investigation by an attorney. Ohio Rev. Code § 3515.155(B).

B. Unsurprising Manipulation of the Scheme to Suppress Political Speech

Ohio political candidates from various parties have used this criminal scheme to deter, hinder, and suppress critical speech, especially during crucial periods of pre-election debate. The proceedings generally have the effect of deterring or precluding expression on key political issues, diverting advocates' attention from important public issues, and keeping the public from hearing and considering political speech at key times in the pre-election process.

C. Manipulation of the Scheme in this Case

In this case, for example, a citizen advocacy group Susan B. Anthony List ("SBA") criticized Mr. Driehaus, an incumbent Democratic congressman, because his vote for the Affordable Care Act ("ACA") constituted a vote "for taxpayer-funded abortion." SBA intended to publish the claim on billboards, and a second advocacy group, Coalition Opposed to Additional Spending and Taxes ("COAST"), intended to repeat the claim.

While the ACA didn't direct payment of federal funds for abortions, it established subsidies to pay insurance premiums for low-income citizens, which

included insurance to cover abortions. On this basis, SBA and COAST claimed the ACA used taxpayer funds to finance abortions.

However, Driehaus filed a complaint with the OEC accusing SBA of violating § 3517.21(B)'s criminal prohibition against false political statements. He also threatened to sue a billboard company if it erected SBA's billboards. Resultantly, the billboard company refused to publish SBA's statement. And due to the threats from Driehaus, SBA and COAST reluctantly abstained from publication of their statements.

At the initial hearing on Driehaus' complaint, a panel of the OEC voted 2-1, along partisan lines, to find probable cause. Before the matter was heard, Driehaus was defeated in the general election and, tellingly, then dropped his complaint before the OEC.

D. Beyond this Case: System-Wide Manipulation of the Scheme

Over the years, Ohioans have consistently faced commission hearings and even potential fines and criminal penalties in response to clearly-protected core political speech. The recent cases below document just some of those instances, and illustrate that at stake here are the First Amendment right of virtually an Ohioan who wishes to engage in political debate, even at the smallest levels of government.

1. William B. Morand v. Lee Speidel[2]

In a local political race, a candidate claimed that his opponent published campaign literature falsely accusing him of "[b]urdening the homeowner with debt to finance commercial building projects" and of being "abusive to women." Only after multiple hearings spanning one and a half years, did the OEC dismissed the complaint. The proceedings nonetheless required the candidates to squander time preparing arguments and testimony for these hearings, diverting attention from public debate on important issues.

2. Flannery v. Ohio Elections Commission[3]

After an incumbent Secretary of State requested that signs be posted in polling centers containing the word "vote" followed by his name, Flannery said the action was a crime. After two hearings, the OEC found that four of Flannery's statements violated § 3517.21(B).

Flannery appealed to an Ohio trial court, and the OEC decision was overturned, and further, the OEC then lost an appeal. Ultimately, while Flannery did not violate R.C. § 3517.21(B), he was nevertheless forced to prepare and finance hearings before the OEC and further litigation before Ohio courts, defending political speech for an election concluded years beforehand.

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[2] OEC case no. 2003E-064.

[3] 804 N.E.2nd 1032 (Ohio App. 2 4).

3. Latta for Congress Committee v. Club for Growth PAC[4]

Similarly, a campaign committee for a Republican congressional candidate complained that the Club for Growth PAC violated § 3517.21(B) when it said the candidate "has a record of supporting higher taxes, including voting for the 2003 tax hike Buehrer opposed and a $1 billion tax hike in 1998" and "also supported a $1 billion tax hike in 1998 that was later rejected by 80% of the voters in a referendum." After two hearings, the OEC found a violation of § 3517.21(B). But yet again, after considerable time, money, and effort, Ohio's courts overturned the OEC decision. Meanwhile, political debate was interrupted in favor of administrative proceedings, and further political speech was chilled in the meantime.

4. Massey v. Wilson[5]

A candidate for township trustee filed a complaint that 9 individuals chatted among themselves about the individual being a "pornographer" and "sex offender." In fact, the candidate had transmitted nude photographs of himself to area women. A panel held a probable cause hearing, requiring the citizens to hire an attorney and drive 3 hours to defend themselves at a hearing in Columbus. Only after the citizens bore this burden were the charges dismissed as frivolous.

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[4] OEC case no. 2007-E03.

[5] OEC case no. 2011E-077.

5. Griffith v. Yarbrough[6]

A supporter of an incumbent Republican congressman filed a complaint transparently intended to divert the campaign of a primary opponent. The complaint alleged that the opponent was "too libertarian" to be "Republican," and thus the opponent lied when telling the electorate he was a "member of the Republican party." Again, the complaint was dismissed only after the opponent hired an attorney, attended and testified at two hearings in Columbus, and suffered unnecessary expense and distraction during a campaign.

About the same time, another supporter of the incumbent filed another OEC complaint against the same opponent asserting that the opponent deceived the electorate when he created a website, www.TiberiTragedy.com, to satirize the congressman's voting record. The website was allegedly deceptive because it didn't really promote the incumbent's campaign, "but instead opposed his election." This complaint was also dismissed, but again distracted the opponent's campaign with expenditures of attention, time and money, all diverted from other important political speech.

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[6] OEC case no. 2011E-088; See also *Mann v. Yarbrough*, OEC case no. 2012E-002.

6. L. George Distel v. Kathy Magda[7]

In a county treasurer's race, the campaign committee for Magda, a political novice, distributed literature containing Magda's name followed by the words "Ashtabula County Treasurer," without the words "for" or "elect." She apologized and changed her campaign literature. Nonetheless, an opponent's supporter complained that Magda "knowingly and intentionally" published the material to mislead voters and unfairly impede the opponent's campaign. An OEC panel found probable cause of a violation of § 3517.21(B), despite referring to the error as a "common mistake."

7. John Schneider v. Alternatives to Light Rail Transit and Stephan Louis

Even when the public is not misled by a statement, a politically self-interested party can bring a claim against an opponent to stifle the opponent's speech and take attention away from the issues of the election. In *John Schneider v. Alternatives to Light Rail Transit and Stephan Louis*, John Schneider, brought a claim against Alternatives to Light Rail Transit (ALRT) and Stephan Louis.[8] Schneider claimed that ALRT and Louis were in violation of the False Claims Act based on Louis's stating, "The Federal Transit Administration rates it one of the worst plans in the

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[7] OEC case no. 2012E-028.

[8] *John Schneider v. Alternatives to Light Rail Transit and Stephan Louis* 2002E-065, Affidavit of Complaint.

country,"[9] referring to a proposal regarding Cincinnati's light rail system.

The statement was based on the rating system located on Federal Transit Administration's (FTA) website.[10] Although FTA's website did not specifically use the word "worst" when rating the light rail systems, "[t]he FTA's report is unambiguous. ... [I]t rates the various cities and it puts them in various categories. And our system rates one of the worst out of all the submissions to the FTA according to the FTA."[11] In addition, although FTA did not explicitly compare the transit systems to one another, a person can easily compare them with each other using the data given by FTA.[12]

After two hearings in Columbus featuring arguments and testimony, the OEC found only a partial violation.[13] Schneider used the statute as a weapon to draw attention away from the issue and to chill his opponent's speech for years afterward in their ongoing dispute about the costs and benefits of a transit system.

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[9] *Id.*

[10] *Schneider v. ALRT and Louis*, Deposition of Louis at 47

[11] *Id.* at 57.

[12] *Id.* at 58.

[13] OEC Violation Findings Letter.

8. Thomas W. Blumer v. Bob McEwen

Likewise, in *Thomas W. Blumer v. Bob McEwen*, Thomas Blumer, filed a complaint against Bob McEwen, for using the titles, "Congressman," "Special Envoy for Presidents," "U.S. Representative to the European Parliament," and "Six-term Ohio Congressman" throughout his campaign.[14] However, McEwen had held all of these positions in the past. Since it is common to refer to a past elected official by his former title, it would be appropriate to use these titles on one's own campaign literature.

Despite this traditional societal understanding, after two hearings in Columbus featuring arguments and testimony, the OEC found there to be a violation of the statute.[15] Like Schneider v. ALRT, even though the statements did not mislead the public, Blumer used the statute as a weapon against his opponent.

These cases illustrate the ubiquity with which, through OEC proceedings, Ohioans political speech is attacked as "false."

E. Court Proceedings in This Case

SBA filed this lawsuit in the United States District Court for the Southern District of Ohio to challenge the Ohio statute as a violation of rights of free speech under the First Amendment to the Constitution. While

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[14] *Thomas W. Blumer v. Bob McEwen*, 2005E-087, Complaint.

[15] *Blumer v. McEwen*, OEC Violation Findings Letter.

state political/administrative proceedings remained pending, the District Court stayed this action under *Younger v. Harris*, 401 U.S. 37 (1971).

COAST filed a separate lawsuit in the same Court, alleging that Driehaus' action and threats of suit had chilled its intended political speech, which was virtually identical to SBA's.

After Driehaus lost the election, he dismissed his OEC proceedings. The SBA then amended its federal Complaint to allege that it wanted to make similar future statements, but was chilled from doing so. Driehaus filed a counterclaim that SBA's statements had defamed him.

The District Court consolidated the two suits and summarily dismissed the claims of both SBA and COAST. As to COAST, the Court reasoned that because no complaint was actually filed against COAST, any risk of prosecution was speculative, chill of COAST's speech – which was identical to SBA's -- was subjective, and COAST's injury was too attenuated to support a claim. The Court also determined that the chilling of SBA's speech was not a cognizable injury because the complaint against SBA had not been finally determined by the Commission.

A panel of the Sixth Circuit affirmed the District Court decision. It posited that injury from the statute could not be shown merely from a history of enforcement or an allegation of the statute's chilling effect, but required a showing of an imminent threat of future prosecution – something lacking in this case because the Commission had not yet made a final

adjudication on SBA's speech. Moreover, because the Petitioners had not admitted that they had or would lie or recklessly disregard truth in their political speech, they had not alleged an intention to disobey the statute so as to show injury.

ARGUMENT

First Amendment protections have allowed American democratic processes to flourish, and continue to distinguish the United States from most of the world. Freedom to speak out in criticism of public officials and candidates for office is a crucial check against abuse of state authority, underpinning a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[16] This unique American system allows for vigorous discussions:

> [D]iscussion of public issues ... integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure the unfettered exchange of ideas for the bringing about of political and social changes desired by people."[17]

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[16] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[17] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995) (citations omitted).

This principled protection of political speech represents a profound trust in the ultimate wisdom of the American people and in their capacity to determine truth. Thus when a law may suppress, hinder, or inhibit core political speech, American courts apply strict scrutiny and reject the law unless it is "narrowly tailored to serve an overriding state interest."[18]

In *United States v. Alvarez*, this Court ruled that *even false statements* are protected by the First Amendment, "[t]his comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[19] In addition, all of the justices agreed that laws restricting false statements in the political context would be subject to strict scrutiny.[20]

As explained in *N.A.A.C.P. v. Button*, "[t]he constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'"[21] In addition, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth - - whether administered by judges,

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[18] *Id.* at 347.

[19] *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012).

[20] *Id.*

[21] *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) paraphrasing *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963).

juries, or administrative officials-and especially one that puts the burden of proving truth on the speaker."[22] However, against the First Amendment's sweeping protection for political speech, Ohio has erected an administrative/criminal scheme that, while purporting to police only intentionally false speech, repeatedly subjects core political speech to administrative review and potential criminal sanctions. According to R.C. § 3517.154(A)(1), "[u]pon the filing of a complaint with the Ohio elections commission, which shall be made by affidavit of any person, on personal knowledge, ... setting forth a failure to comply with or a violation of any provision ... the commission shall proceed in accordance with sections 3517.154 to 3517.157 of the Revised Code," which require at least one substantive hearing. Accordingly, irrespective of the statement's truthfulness, the respondent must appear and defend at a minimum of one hearing, conducted by anything but experts, in Columbus, Ohio.

This scheme fails to offer prompt judicial review or other safeguards to mitigate the chilling effect on political speech. To the contrary, a complaint may be filed by "any person" based on a subjective belief that another's political rhetoric is false (a foregone conclusion for much legitimate political debate[23]), and

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[22] *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

[23] "[T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion ... all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on

statutory administrative procedures subject the speaker to a series of evidentiary hearings and investigation, all at the whim of a political body, often during a pre-election period when communication is most urgent. The public forum for evaluation of truth and political speech is thus transferred to a forum of politically-appointed bureaucrats charged to decide the truth in place of the public.

Under the scheme, a citizen exercising a civic responsibility to speak on political issues may also face a charge of political falsehood and a criminal accusation. A Hobson's choice arises: the speaker may abandon a contested message in hopes of settling the dispute and addressing other important issues before an election, an unfortunate but reasonable option chosen by COAST in this case; or alternatively, the speaker may divert significant time and other resources to defend the speech before the political administrative body, at the expense of diverting resources from actually spreading the message, and at a risk of criminal charges.

Under either alternative, the message is undermined, either because the speaker "volunteers" silence or resources are diverted from speech. The speaker is frustrated. And more importantly, public access to the message is diminished. Regardless of the

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adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct." John Stuart Mill, *On Liberty* (Oxford: Blackwell, 1947) at 47.

speaker's choice, the result is that vibrant public debate essential to American democracy is curtailed.

Despite the statutes' suppression of political speech, the Sixth Circuit ruled that the issue is not eligible for the Court's review because neither SBA nor COAST -- both groups regularly outspoken on political issues -- were successfully prosecuted for violating the law. According to the position articulated by the Sixth Circuit, the Petitioners cannot challenge the constitutionality of the speech-restrictive statute until they are prosecuted and either admit a violation of the statute or are adjudicated guilty. Only then will the threat of jeopardy become sufficiently imminent to justify standing based on a cognizable risk of prosecution for political speech. Until then, a speaker facing the filing of a complaint, subjected to multiple hearings before a political tribunal, receiving findings of probable cause of a violation, and diverting resources away from speech to defend against the charge, exhibits mere subjective concerns. The speaker's responsive action to refrain from speech is equally subjective and does not constitute standing to challenge the scheme.

Illogically, the Sixth Circuit's overly restrictive approach to the justiciability of this important constitutional protection invites an untenable level of government control over the content of political criticism of government: it invites political operatives to file complaints that will subject a speaker to multiple hearings, under threat of criminal prosecution, unless the speaker abandons an election-related message. After the election, when the speech

can no longer influence public action, the complaint can be dropped – as in this case.

The Sixth Circuit's approach runs contrary to decisions of this Court and several other Circuits. This Court has ruled that, when challenging a government restriction on First Amendment grounds, a speaker secures standing when he shows a "credible threat of prosecution."[24] More precisely, a person faces a credible threat of prosecution, and earns standing, when the person shows that a state regulation arguably infringes on a constitutional right, when the person's actions could be construed to violate the state restriction.[25] This Court has pointedly instructed that a speaker need not "undergo a criminal prosecution" before challenging a constitutionally-restrictive law.[26] The following cases will illustrate the detrimental effect this statute has on one's First Amendment Right. This statute results in the stifling of one's ability to freely debate and discuss issues during elections, when the free exchange of ideas is crucial. In addition, politically self-interested parties use the False Claims Act as a weapon against their opponents to chill their speech during a campaign. Despite a statement's validity, a respondent must go through the process since there is no route for judicial interference.

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[24] *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979).

[25] *Id.*

[26] *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

In *Citizens United v. Federal Election Commission,* this Court stated, "the First Amendment does not permit laws that force speakers to retain a campaign finance attorney ... before discussing the most salient points of our day" and "political speech must prevail against laws that would suppress it, whether by design *or inadvertence*."[27] Under clear United States Supreme Court and Sixth Circuit precedent, "regulations that are triggered solely by speech are in fact regulations of speech."[28] Despite these rulings, Ohio's statute allows a politically-interested party to file a complaint against someone, no matter whether the respondent's speech is true or not. This is impermissible, and to protect Ohioans' rights, judicial intervention must be permitted.

CONCLUSION

In *Cantwell v. Connecticut*, this court declared:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are

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[27] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 324 (2009). (Emphasis added).

[28] *Commonwealth Brands, Inc. v. U.S.* Not Reported in F. Supp. 2d, 2009 WL 3754273 (W.D. Ky. 2009). On appeal, the Sixth Circuit endorsed this reasoning. See *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, C.A.6 (Ky.) 2012.

> prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[29]

Despite this view, Ohio's False Claims Act stifles political speech. However, chilling of speech, like what is found in these cases, is a detriment to society as a whole:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'[30]

Because of this statute, people refrain from speaking because of the potential threat of litigation, which net effect is censorship. By allowing this statute to stand as is, without the option of judicial intervention, citizens of Ohio are in essence being stripped of their First Amendment Right and are prevented from hearing an unfettered debate of the issues.

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[29] *Cantwell et al. v. State of Connecticut*, 310 U.S. 296, 309 (1940).

[30] *Samuel Roth v. United States*, 354 U.S. 476, 484 (1987).

Respectfully submitted,

Gregory A. Keyser
Counsel of Record
6657 Hitching Post Lane
Cincinnati, Ohio 45230
859-630-8079
gregkeyser@gmail.com

Counsel for Amicus Curiae
Club for Growth

Maurice Thompson
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
614-340-9817
MThompson@OhioConstitution.org

Counsel for Amicus Curiae
1851 Center for Constitutional Law

AMICUS CURIAE BRIEF

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

RICHARD P. BRESS
ANDREW D. PRINS
KATHRYN A. WORTHINGTON
SASCHA M. HELLER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Amicus Curiae
Institute for Justice

WILLIAM H. MELLOR
PAUL M. SHERMAN
Counsel of Record
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
psherman@ij.org

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-2000

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1991, the Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute routinely files pre-enforcement challenges to laws that chill speech. The Institute is deeply concerned about the effect that the decision below will have on the ability of speakers to seek such pre-enforcement judicial review in federal court, which the Institute believes is vital to the protection of the First Amendment.

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case is of central concern to Cato because it relates to the chilling of political speech,

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* state that they timely informed all parties of their intent to file this brief in support of the petition for certiorari. All parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the protection of which lies at the very core of the First Amendment.

SUMMARY OF THE ARGUMENT

"The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.'" *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010) (citation omitted). Such speech "must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 340. Yet the Sixth Circuit slammed shut the courthouse door on plaintiffs looking to challenge a criminal law *that is specifically intended to suppress certain types of political speech*.

In this case, that criminal statute had already been invoked against Petitioner Susan B. Anthony List ("SBA List") once, and the Ohio Elections Commission had already found there was "probable cause" to conclude that SBA List's speech violated the statute. In addition, both SBA List and the Coalition Opposed to Additional Spending and Taxes ("Petitioners") alleged they wish to engage in materially the same speech in the future. Yet the Sixth Circuit nonetheless ruled that Petitioners cannot bring a pre-enforcement challenge because, in its view, the likelihood of the statute being enforced against them in the future was still too remote. After all, Petitioners would not admit that they intend to make statements that are "false" and will thereby violate the statute. And, even though the statute permits "any person" to initiate a proceeding, the particular politician who lodged the previous complaint against SBA List had moved to Africa after losing the election, so who can say anyone will invoke the statute in the next election?

The Sixth Circuit's approach departs radically from the First Amendment justiciability principles applied by this Court and federal courts elsewhere in the country, which recognize that pre-enforcement challenges are critical to ensuring vibrant and unobstructed political discourse. This Court and most others appreciate that a First Amendment plaintiff bringing a pre-enforcement challenge to a statute that *arguably* proscribes his speech states a justiciable claim absent a strong indication that the statute will not be enforced, such as disavowal by the government—either actual or implied from the statute having fallen into extreme disuse. But the Sixth Circuit demands far more, requiring a near certainty of future enforcement or a prior definitive determination by the government that the plaintiff previously violated the law. If allowed to stand, the Sixth Circuit's decision will, in the four States it covers, foreclose pre-enforcement challenges that the vast majority of judges and other citizens think ought to at least be *heard*, regardless of how they are ultimately decided on the merits.

The Sixth Circuit also short-changed fundamental political speech protections by shutting its eyes to how the statute operates in the real world. In deciding there was no credible threat that the statute would be enforced against Petitioners, it failed to appreciate the significance of the complaint-driven enforcement mechanism that allows "any person" to initiate mandatory proceedings before a government commission to adjudicate the falsity of a political opponent's speech. Contrary to the Sixth Circuit's reasoning, this mechanism obviously makes it far *more* likely that the statute will be invoked. In fact, statutes like this are frequently used as

weapons in campaign arsenals to silence or distract political opponents in the midst of heated elections. Such practical realities should not be ignored by courts.

ARGUMENT

Petitioners challenged an Ohio law that raises obvious First Amendment concerns because it specifically targets certain types of political speech. The statute criminalizes both (1) making a "'false statement concerning the voting record of a candidate or public official'" "'knowingly and with intent to affect the outcome'" of a campaign and (2) disseminating "'a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.'" Pet.App.3a-4a (citation omitted). "[A]ny person" is able to file a complaint with the Ohio Elections Commission, and the Commission is then obligated by law to initiate an investigation and other onerous proceedings to ultimately judge the truth of the speech. *See id.* at 4a. Other states within the Sixth Circuit also have false-political-speech laws.[2]

This Court has long recognized that "[w]hen the plaintiff has alleged an intention to engage in a course of conduct *arguably* affected with a constitutional interest, but proscribed by a statute, and there exists a *credible threat of prosecution* thereunder, he 'should not be required to await and

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[2] Tenn. Code Ann. § 2-19-142; Mich. Comp. Laws § 168.944; *id.* § 168.931(3).

undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added) (citation omitted). Such a credible threat is presented by the mere existence of a statute that is "recent and not moribund," *Doe v. Bolton*, 410 U.S. 179, 188 (1973), and that the government has not "disavowed any intention" of enforcing, *Babbitt*, 442 U.S. at 302.

The Sixth Circuit paid lip service to the credible threat of prosecution standard, Pet.App.8a, but applied something else entirely. It held that, for a threat to be "credible," there must have been a previous determination by the government that the plaintiff violated the law—"a final adjudication, a finding of a violation, or [at least] a warning." *Id.* at 11a-12a. But as this Court and other courts have long recognized, government action far less definitive than that will create a credible threat of prosecution that chills speech. In addition, the Sixth Circuit believes it insufficient that a plaintiff's speech *arguably* comes within the scope of the statute; rather, that court requires plaintiffs to allege that they intend to *actually violate the law*, *id.* at 15a, which in this case would mean destroying their credibility by telling the world they are liars as the price to get into court. Of course, very few people would do that, which is why other courts do not require it. Besides, parties engaged in heated political debate often disagree about what is and what is not "false." The Sixth Circuit's erroneous standard eviscerates meaningful pre-enforcement review in many situations where it is obviously warranted and would be permitted without

hesitation in other parts of the country. This Court should not let it stand.

The Sixth Circuit also erred by viewing the credible-threat inquiry in an overly formalistic way. It recognized that the statute's complaint-driven framework "hardly erects an [sic] formidable barrier to enforcement," *id.* at 12a, but then brushed that concern aside and required proof of specific individuals who would file the complaints that would trigger the future application of the statute against Petitioners, *see id.* at 12a-14a. That approach ignores the obvious: In the political context, the temptation to abuse statutes like the one at issue for political gain is great and the consequences minimal. It is extremely likely that statutes like this will be employed against political opponents as a matter of course. This Court should clarify that, in analyzing justiciability, courts cannot ignore the practical realities of the way a statute will operate.

I. THE SIXTH CIRCUIT'S JUSTICIABILITY STANDARD FOR PRE-ENFORCEMENT CHALLENGES TO SPEECH-SUPPRESSING LAWS CONFLICTS WITH THE STANDARD APPLIED BY THIS COURT AND OTHER COURTS OF APPEALS

The First Amendment reaffirms important and highly valued rights that are at the heart of our constitutional tradition. But "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of [a] statute." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). When that happens, "[s]ociety as a whole [is] the loser." *Secretary of Md. v. Joseph H. Munson Co.*, 467 U.S.

947, 956 (1984). Pre-enforcement challenges play a vital role in preventing that from happening by removing impediments to the "'open marketplace' of ideas protected by the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (citation omitted).

Threats to First Amendment freedoms necessitating pre-enforcement review arise not just in the high-stakes world of federal politics like in *Citizens United*, but in local politics and in the more mundane goings-on of everyday life. The decision below—which demands certainty of prosecution or a past finding of violation, plus an admission of intent to violate a criminal statute before allowing a pre-enforcement challenge—all but shuts down this crucial avenue of relief across a significant portion of this country. The Sixth Circuit's error is fundamental and has dire implications. If not corrected, it will profoundly limit the free speech rights of ordinary Americans.

Examples of the sort of speakers who will be unable to seek meaningful pre-enforcement protection for their First Amendment rights abound in the Federal Reports, but a handful of examples will suffice to illustrate the problem.

1. Julie Towbin was 17 when she was invited to attend a local political event organized by the Palm Beach County Democratic Executive Committee. *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1277 (S.D. Fla. 2012). Ms. Towbin was a former Page in the U.S. House of Representative and had a "keen and abiding interest in politics." *Id.* She wanted to attend the event, but was concerned that her purchase of its $150 ticket would run afoul of a provision of Florida law that prohibited, with limited

exceptions, "political contributions by minors of more than $100 to individual candidates or political organizations." *Id.* A single unlawful contribution is a first degree misdemeanor; a second is punishable as a third degree felony. *Id.* (citing Fla. Stat. § 106.08(7)(a)-(b)). When Ms. Towbin reached out to the Florida Elections Commission and State Attorney to ask whether the law applied, they declined to issue an "advisory opinion," and the State's Attorney General noted only that the "statute 'remains applicable'" and carries criminal penalties. *Id.* Ms. Towbin ultimately did not go to the event, but "steadfastly [held] on to a 'definite, and serious, desire and intention to contribute in excess of $100 to a political committee and/or candidates of her choice'" if "not for the criminal penalties she [would] face[]." *Id.* (citation omitted). Rather than allow the statute to squelch her budding interest in political participation, she mounted a pre-enforcement challenge. *Id.* at 1281-83. Thankfully, the district court enjoined the unconstitutional statute, vindicating Ms. Towbin's rights and freeing her to engage in the political process. *Id.* at 1290-02. But that would not have happened in the Sixth Circuit. In Kentucky, Michigan, Ohio, and Tennessee, such a claim would have been dismissed as too speculative, absent more proof that the state would in fact enforce the statute against Ms. Towbin.

2. Steve Cooksey is a North Carolina resident living with Type II diabetes. *Cooksey v. Futrell*, 721 F.3d 226, 229-30 (4th Cir. 2013). He has been able to control his diabetes and lose 78 pounds by maintaining a diet low in carbohydrates but high in fat. *Id.* at 230. Inspired by his lifestyle change and wishing to help others with similar problems, Mr.

Cooksey started a website called "Diabetes Warrior" to talk about his weight loss and diet, distribute meal plans, provide advice to readers, and advertise his fee-based diabetes support and life-coaching services. *Id.* His website stated he was not a licensed medical professional and did not have any formal credentials. *Id.*

In January 2012, shortly after attending a nutritional seminar in which he expressed disagreement with dietary advice given by the director of diabetic services from a nearby hospital, Mr. Cooksey received a call from the Executive Director of the State Board of Dietetics/Nutrition, informing him that he and his website were "under investigation," and that the State Board had the statutory authority to seek an injunction to prevent the unlicensed practice of dietetics. *Id.* at 230-31. Mr. Cooksey was told he should shut down his life-coaching services. *Id.* at 231. He then received a printed red-pen review of his website, depicting the State Board's "areas of concern." *Id.* at 231-32. Worried that the Board would take legal action against him, Mr. Cooksey removed the text to which the State Board objected, and he subsequently received notice that the complaint against him was closed, albeit with the caveat that the Board reserved the right to "monitor this situation." *Id.* at 237.

Mr. Cooksey brought a pre-enforcement First Amendment challenge and was eventually allowed his day in court, but only after the Fourth Circuit reversed a district court that made many of the same errors as the Sixth Circuit here. *Id.* at 234-41.[3] He

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[3] Mr. Cooksey is represented by *amicus* Institute for Justice.

would not have been so lucky had he resided in Ohio instead of North Carolina. After all, the statute was not actually enforced against Mr. Cooksey. The Board's communications pointing out "areas of concern" had expressed some tentativeness about its conclusions, *see id.* at 231, and did not *conclusively* establish that Mr. Cooksey violated the law, or even make an official finding that there was "probable cause" to believe the law was violated. And Mr. Cooksey had not alleged that he intended to engage in speech that definitely violated the law, only that he intended to engage in speech that arguably came within the statute's reach. *Id.* at 238.

3. James Wilson was arrested in El Reno, Oklahoma after distributing anonymous handbills opposing the election of a candidate for state senate. *Wilson v. Stocker*, 819 F.2d 943, 945, 947 (10th Cir. 1987). Under then-existing Oklahoma law, the handbills were arguably illegal because they did not contain Mr. Wilson's name and address. *Id.* at 247-48 (citing Okla. Stat. tit. 26, § 15-111 (Supp. 1985)). The prosecutor never pursued the charges, but Wilson wished to continue the same conduct that precipitated his prior arrest, and he quite reasonably feared that he might be rearrested. *Id.* at 246. The Tenth Circuit gave Wilson relief, but he would not have had his day in court in the Sixth Circuit. Under Sixth Circuit doctrine, Wilson's prior arrest for the same conduct would not indicate a credible threat of prosecution in the future. After all, an arrest only establishes that the state has found *probable cause* that the law has been violated, exactly what the Commission panel found as to SBA List below.

If they had been in any of the four States of the Sixth Circuit, Ms. Towbin, Mr. Cooksey, and Mr. Wilson would have had to risk significant civil or criminal consequences to vindicate their constitutional rights. Without the possibility of pre-enforcement review, they likely would have remained silent, and the laws in question would have remained unchallenged, continuing to erode their and others' First Amendment freedoms unless someone with the extraordinary gumption (and means) to risk civil or criminal penalties came along.

That is not the law in most of the country. As Petitioners ably demonstrate, the Sixth Circuit has departed radically from this Court's precedents. The Sixth Circuit persistently demands certainty of prosecution, in conflict with this Court's repeated holdings that all that is required is a credible threat—a threat that is presumed from the very existence of a non-moribund statute which arguably proscribes the plaintiff's speech. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968) (pre-enforcement challenges proper even without a particularized threat of enforcement, and even if the statute has not been recently enforced); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (when statute was "recent and not moribund," plaintiffs "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (permitting facial challenge though the pertinent provision of the act had "not yet been applied and may never [have] be[en] applied" when the State had not "disavowed any intention" of enforcing it); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (permitting challenge where

state had "not suggested that the newly enacted law will not be enforced" and Court saw "no reason to assume otherwise"). This Court's holdings demonstrate that in such circumstances "the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

The Sixth Circuit's approach also starkly conflicts with the approach taken by its sister circuits, which presume a credible threat of prosecution absent strong evidence that the statute will not be enforced.[4] *See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner*, 99

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[4] The Sixth Circuit's extreme hostility to pre-enforcement challenges stands alone among the circuits. But it reflects a broader confusion in the lower courts about how to classify an injury in a "chilling" case in light of this Court's decisions in *Laird v. Tatum*, 408 U.S. 1 (1972), and *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), holding that a "subjective chill" is insufficient to confer standing. Some courts, like the one below, interpret those decisions as foreclosing recognition of any chilling-based injury, and instead look only to the harm flowing from the possible future exercise of government power. *See* Pet.App.9a-10a; *Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 566 (6th Cir. 1995); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-79 (D.C. Cir. 1984). Viewing the injury as a possible *future* one encourages the application of additional ripeness scrutiny to ensure the harm is not speculative. Other courts recognize that objectively reasonable self-censorship (as opposed to a "subjective chill") is itself a cognizable *present* injury that has already occurred, and thus take a less restrictive approach to ripeness. *See, e.g., 281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2013); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003); *see also Cooksey*, 721 F.3d at 239-40. This confusion adds to the need for this Court's intervention.

F.3d 8, 15 (1st Cir. 1996); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 484-86 (8th Cir. 2006); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382-84 (2d Cir. 2000). The decision also conflicts with other circuits because the Sixth Circuit requires First Amendment plaintiffs to tarnish their own reputation by admitting they intend to engage in illegal conduct in order to get into court, Pet.App.15a, whereas other circuits recognize that such a requirement would itself chill speech and therefore only require plaintiffs to demonstrate they intend to engage in conduct that *arguably* comes within the law's reach. *E.g.*, *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2013); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003); *Majors*, 317 F.3d at 721; *New Hampshire Right to Life Political Action Comm.*, 99 F.3d at 14.

Americans' ability to contest laws that chill core political speech should not depend on the circuit in which they reside. This Court should grant certiorari to resolve this conflict and correct the Sixth Circuit's persistent and fundamental misunderstanding of the important justiciability principles at stake in pre-enforcement First Amendment challenges.

II. THIS COURT SHOULD CLARIFY THAT THE EXISTENCE OF HARM ARISING FROM A CREDIBLE THREAT OF PROSECUTION IS A PRACTICAL, NOT FORMALISTIC, INQUIRY

The Sixth Circuit also erred in another important way, by viewing Petitioners' claims in a formalistic way that ignored the practical realities of the complaint-driven nature of the statute at issue. Recognizing that the statute expressly allows "any person" to initiate a Commission proceeding, the court asked "[w]ho is likely to bring a complaint to set the wheels of the Commission in motion?" Pet.App.4a, 12a. *Amici* respectfully submit, as did Petitioners below, *see id.*, that the answer is obvious: *a political opponent*. This Court should clarify that courts must take a practical view and consider how a challenged statute operates in practice when determining whether there is a credible threat, as most other courts already do.

Under the challenged Ohio statute, upon receipt of a complaint by "any person" alleging a violation of the false speech laws, the Commission *must* initiate proceedings. Ohio Rev. Code Ann. § 3517.153(A). And if the complaint is filed shortly before an election, a Commission panel *must* convene an expedited hearing to determine whether there is probable cause for the full Commission to hear the case and determine whether there has been a violation. *Id.* §§ 3517.154(A)(1), 3517.156(A). Absent all parties' agreement, the respondent has no right to argue, testify, or submit evidence to the panel to contest the charges. Ohio Admin. Code 3517-1-10. If probable cause is found, full Commission proceedings

begin. Ohio Rev. Code Ann. §§ 3517.155(A)(1), 3517.156(A). In that event, the Commission conducts a full administrative trial, including discovery, Ohio Admin. Code 3517-1-09, direct and cross examination of witnesses, *id.* 3517-1-11(B)(2)(d), and questioning by members of the Commission, *id.*

In the real world, the risk of being dragged through that burdensome process is a formidable deterrent to political speech. Wholly aside from the indignity, expense, and potential consequences, the process will inevitably distract the speaker's attention and resources away from getting out his message. This is especially so when expedited proceedings are initiated on the eve of an election.[5]

Election-related speech reforms of the sort at issue here are plagued with unintended consequences. Through simple inertia, incumbents generally benefit from curtailed speech and therefore have a significant incentive to attempt to suppress it. *Cf. McConnell v. FEC*, 540 U.S. 93, 306 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part) (recognizing that reform operated as an "an incumbency protection plan"), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). And complaint-driven statutes like this one are frequently used as strategic weapons to

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[5] Being haled before the Commission is even more burdensome than being sued in court for libel, where the extreme unlikelihood of obtaining any sort of preliminary injunctive relief will generally ensure that proceedings unfold at a reasonable pace that allows the speaker to continue to give some attention to getting out his message.

silence political speech in the final hours when it is most valuable, precisely because they are so easy to invoke. For example, *amicus* Institute for Justice is currently litigating in the Eleventh Circuit a challenge to certain of Florida's campaign-finance laws that permit citizens to file a sworn complaint with the Florida Elections Commission alleging a violation. In that case, the investigations manager for the Commission and the Commission's Rule 30(b)(6) designee admitted under oath that *approximately 98%* of the complaints it receives are "politically motivated," and that "many times" complaints are filed by individuals seeking to "punish their political opponent" or to "harass that person or otherwise divert their attention from their campaign." Dep. Tr. of David Flagg at 16:16-25, 18:1-2, 19:6-15, *Worley v. Detzner*, No. 4:10-cv-00423 (N.D. Fla.), ECF No. 40-26.

And Florida law is not an isolated problem. In another case litigated by the Institute for Justice, *Sampson v. Buescher*, 625 F.3d 1247, 1259-61 (10th Cir. 2010), which involved a particularly oppressive use of a complaint-driven private enforcement provision in Colorado's campaign laws, *two* of the Colorado Secretary of State's experts admitted under oath that private enforcement provisions are often used to silence speech or to gain political advantage. One, a Colorado political pollster and strategist, testified that political opponents use the private enforcement provision as a strategic tool during campaigns. Dep. Tr. of Floyd Ciruli at 37:19–39:1, *Sampson v. Coffman*, No. 1:06-cv-01858 (D. Colo.), ECF No. 30-40. The other, a lawyer who worked for the California Secretary of State and was general counsel to the California Fair Political Practices

Commission, testified that most of the private complaints filed under California's private enforcement provision were either baseless or brought for publicity purposes in order to give one competitor in an election an advantage. Dep. Tr. of Robert Stern at 27:21-28:9, 36:4-37:11, *Sampson v. Coffman*, No. 1:06-cv-01858 (D. Colo.), ECF No. 30-41. Consistent with these experiences, the district court in *Sampson* concluded that "[t]here can be no doubt that [complainants] used the private enforcement provisions to attempt to silence the plaintiffs by the filing of the complaint." *Sampson v. Coffman*, No. 06-cv-01858-RPM, 2008 WL 4305921, at *20 (D. Colo. Sept. 18, 2008), *aff'd in part, rev'd in part by Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

This Court's precedents do not require courts to turn a blind eye to the destructive realities imposed by enforcement processes themselves. To the contrary, this Court long ago recognized that these harms are not eliminated by "the improbability of successful prosecution." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). "The chilling effect upon the exercise of First Amendment rights may derive *from the fact of the prosecution, unaffected by the prospects of its success or failure.*" *Id.* (emphasis added); *cf. Citizens United*, 558 U.S. at 335 (looking to practical concerns to determine whether regulatory scheme acted as a prior restraint).

Unlike the Sixth Circuit here, other courts recognize the importance of practical concerns raised by complaint-driven or private enforcement mechanisms when evaluating justiciability. In *Chamber of Commerce of the United States v. FEC*,

for example, the D.C. Circuit addressed a First Amendment pre-enforcement challenge to an FEC rule that seemed to restrict certain political communications to the plaintiff organizations' members. 69 F.3d 600, 601 (D.C. Cir. 1995). There was no imminent threat of enforcement proceedings because the FEC was publicly deadlocked on whether and how to enforce the rule, and a majority vote of the commission was necessary to institute enforcement proceedings. *Id.* at 603. Nonetheless, the court found standing, because the unusual nature of the enabling statute permitted a "political competitor" to "challenge the FEC's decision *not* to enforce" and therefore subject the speaker to litigation "even without a Commission enforcement decision." *Id.*

The First Circuit tackled a similar issue in *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003). That case involved a criminal libel statute that, because of the operation of Puerto Rico law, permitted individuals to file a complaint with the police or pro se to initiate a criminal libel action; it was only after a probable cause hearing that the prosecutors would become involved. *Id.* at 58-59. The court correctly recognized that standing would exist even if the prosecutors had "disavow[ed] any intention to prosecute" because they exercised no control over whether proceedings would be initiated. *Id.* at 59. It held that "[t]he plaintiff's credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that [he] would be convicted." *Id.* So too here for those engaging in speech in the midst of an election who are haled before a Commission to justify their speech.

Had the Sixth Circuit taken a more practical view of the statute, it would have recognized that there was a credible threat of prosecution inherent in its design.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD P. BRESS
ANDREW D. PRINS
KATHRYN A. WORTHINGTON
SASCHA M. HELLER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Amicus Curiae
Institute for Justice

WILLIAM H. MELLOR
PAUL M. SHERMAN
Counsel of Record
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
psherman@ij.org

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-2000

September 12, 2013

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 24 2014
OFFICE OF THE CLERK

No. 13-193

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

JOINT APPENDIX

ERIC E. MURPHY
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
30 East Broad St.
Columbus, OH 43215-3428
(614) 466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for State Respondents

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Petitioners

[Additional counsel listed on inside front cover]

PETITION FOR CERTIORARI FILED AUGUST 9, 2013
CERTIORARI GRANTED JANUARY 10, 2014

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U.S. District Court
Southern District of Ohio (Cincinnati)
CIVIL DOCKET FOR CASE #: 1:10-cv-00720-TSB

Susan B. Anthony List v. Driehaus et al
Assigned to: Judge Timothy S. Black
Case in other court: Sixth Circuit Court of Appeals, 10-04320
Sixth Circuit Court of Appeals, 11-03894
Sixth Circuit Court of Appeals, 11-03925
Sixth Circuit, 13-03238

Cause: 42:1981 Civil Rights

Date Filed: 10/18/2010
Date Terminated: 01/25/2013
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
		* * *
10/18/2010	1	COMPLAINT against All Defendants, filed by Susan B. Anthony List. [ELECTION ISSUE(S) CITED] (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Civil Cover Sheet and # 7 Filing Fee Receipt) (mtw1) (Entered: 10/18/2010)
10/18/2010	2	MOTION for Temporary Restraining Order, MOTION for Preliminary Injunction by Plaintiff Susan B. Anthony List. [ELECTION ISSUE(S) CITED] (mtw1) (Entered: 10/18/2010)

* * *

10/19/2010	7	RESPONSE in Opposition re 2 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Defendant Steve Driehaus. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Attached Unpublished Decision) (De Marco, Paul) (Entered: 10/19/2010)
10/19/2010	8	RESPONSE to Motion re 2 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Defendants Charles Calvert, Bryan Felmet, John Mroczkowski, Philip Richter, Harvey Shapiro, Jayme Smoot, Degee Wilhelm, Larry Wolpert. (Attachments: # 1 Exhibit A PC Depositions, # 2 Exhibit B Order issued 10- 19-10 re Krikorian v. OEC) (Gale, Erick) (Entered: 10/19/2010)
10/20/2010	9	REPLY to Response to Motion re 2 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by

		Plaintiff Susan B. Anthony List. (La Rue, Joseph) (Entered: 10/20/2010)
		* * *
10/20/2010	11	MOTION for Leave to *File Affidavit in Support of TRO & Preliminary Injunction Motion* by Plaintiff Susan B. Anthony List. (Attachments: # 1 Affidavit Doug Johnson, National Right to Life Committee) (La Rue, Joseph) (Entered: 10/20/2010)
		* * *
10/20/2010	13	NOTATION ORDER — For good cause shown, Plaintiff's motion for leave to file an affidavit in support of its motion for Temporary Restraining Order and Preliminary Injunction (Doc 11) is hereby GRANTED. The Court shall consider the affidavit of Doug Johnson as part of Plaintiff's reply brief. Signed by Judge Timothy S. Black on 10/20/2010. (sc1) (Entered: 10/20/2010)
		* * *
10/25/2010	14	ORDER STAYING THIS CASE AND DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER (Doc. 2) Signed by Judge Timothy S. Black on 10/25/10. (mr1) Modified on 10/28/2010 to correct text(kje1).

		(Entered: 10/25/2010)
10/26/2010	15	NOTICE OF APPEAL as to 14 Terminate Motions, Order Staying Case by Plaintiff Susan B. Anthony List. Filing fee $ 455. (La Rue, Joseph) (Entered: 10/26/2010)
		* * *
10/29/2010	16	ORDER of USCA as to 15 Notice of Appeal filed by Susan B. Anthony List. It is ordered that the 2 Motion for an injunction pending appeal is DENIED. (lk1) Modified on 11/1/2010 to correct typo (cib1). (Entered: 10/29/2010)
11/19/2010		Cases 1:10-cv-00720 and 1:10-cv-00754 are CONSOLIDATED. All future filings are to be made in case #1:10-cv-00720. (Associated Cases: 1:10-cv-00720-TSB, 1:10- cv-00754-TSB) (mtw1) (Entered: 11/19/2010)
12/02/2010	17	AMENDED COMPLAINT against Charles E Calvert, Bryan Felmet, John R Mroczkowski, Ohio Elections Commission, Philip Richter, Harvey H Shapiro, Jayme P Smoot, Degee Wilhelm, Larry L Wolpert, filed by Coalition Opposed To Additional Spending & Taxes. (Attachments: # 1 Exhibit A - Susan B. List Advertisement, # 2 Exhibit B - OEC Complaint Against SBA List by Steven Driehaus, # 3 Exhibit C - COAST e-mail desired to be sent)Associated

		Cases: 1:10-cv-00720-TSB, 1:10-cv-00754-TSB (Hartman, Curt) (Entered: 12/02/2010) 12/03/2010 18 ANSWER to 1 Complaint, with Jury Demand , COUNTERCLAIM
12/03/2010	18	ANSWER to 1 Complaint, with Jury Demand , COUNTERCLAIM against Susan B. Anthony List filed by Steve Driehaus. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (De Marco, Paul) (Entered: 12/03/2010)
		* * *
12/06/2010	20	ORDER LIFTING STAY. Signed by Judge Timothy S. Black on 12/6/2010. (mdf1) (Entered: 12/06/2010)
		* * *
12/21/2010	23	ORDER of USCA as to 15 Notice of Appeal GRANTING appellant's motion to voluntarily dismiss the appeal filed by Susan B. Anthony List. (lk1) (Entered: 12/21/2010)
		* * *
12/21/2010	25	AMENDED COMPLAINT against Ohio Secretary of State Jennifer Brunner, and against Charles Calvert, Steve Driehaus, Bryan Felmet, John Mroczkowski, Ohio Elections Commission, Philip Richter, Harvey Shapiro, Jayme Smoot, Degee Wilhelm, Larry Wolpert, filed by Susan B. Anthony List. (Attachments: # 1 Exhibit The

		SBA List Articles of Incorporation, # 2 Exhibit Letter from Paul De Marco to Lamar Advertising Company, # 3 Exhibit Rep. Driehaus' Complaint, # 4 Exhibit Rep. Driehaus' Second Complaint, # 5 Exhibit Commission's Probable Cause Hearing Transcript, # 6 Exhibit Rep. Driehaus' First Request for Production of Documents, # 7 Exhibit Subpoenas Issued to Third Parties, # 8 Exhibit Rep. Driehaus' Motion to Withdraw Complaints, # 9 Exhibit Email Message from the Commission Regarding Motion to Withdraw Complaints, # 10 Exhibit December 9, 2010 Article — Driehaus May Run Again) (La Rue, Joseph) (Entered: 12/21/2010)
12/22/2010	26	Second AMENDED COMPLAINT against Charles E Calvert, Bryan Felmet, John R Mroczkowski, Ohio Elections Commission, Philip Richter, Harvey H Shapiro, Jayme P Smoot, Degee Wilhelm, Larry L Wolpert, Jennifer Brunner, filed by Coalition Opposed To Additional Spending & Taxes. (Attachments: # 1 Exhibit - Susan B. List Advertisement, # 2 Exhibit B - OEC Complaint Against SBA List by Steven Driehaus, # 3 Exhibit C - COAST e-mail desired to be sent)Associated Cases: 1:10-cv-

		00720- TSB, 1:10-cv-00754-TSB (Hartman, Curt) Modified to clarify docket text on 12/22/2010 (sct1). (Entered: 12/22/2010)
01/31/2011	27	ANSWER to 25 Amended Complaint COUNTERCLAIM against Susan B. Anthony List filed by Steve Driehaus. (De Marco, Paul) Modified to clarify docket text on 2/1/2011 (jlw1). (Entered: 01/31/2011)
		* * *
01/31/2011	28	ANSWER to 27 Answer to Amended Complaint, Counterclaim filed by Susan B. Anthony List. (La Rue, Joseph) (Entered: 01/31/2011)
01/31/2011	29	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF JURISDICTION by Defendants Charles Calvert, Bryan Felmet, John Mroczkowski, Ohio Elections Commission, Philip Richter, Harvey Shapiro, Jayme Smoot, Degee Wilhelm, Larry Wolpert. (Gale, Erick) (Entered: 01/31/2011)
01/31/2011	30	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF JURISDICTION by Defendants Charles Calvert, Bryan Felmet, John Mroczkowski, Ohio Elections Commission, Philip Richter, Harvey Shapiro, Jayme Smoot,

Degee Wilhelm, Larry Wolpert. (Gale, Erick) (Entered: 01/31/2011)

* * *

02/08/2011 31 MOTION to Dismiss Plaintiff Susan B. Anthony List's Claims Under Fed.R.Civ.P. 12(b)(1), 12(b)(6), and 12(c), and Partial Joinder in 29 Motion to Dismiss by the OEC Defendants by Defendant Steve Driehaus. Responses due by 3/4/2011 (De Marco, Paul) Modified to clarify docket text on 2/9/2011 (jlw1). (Entered: 02/08/2011)

02/24/2011 32 RESPONSE in Opposition re 31 MOTION to Dismiss Plaintiff Susan B. Anthony List's Claims Under Fed.R.Civ.P. 12(b)(1), 12(b)(6), and 12(c), and Partial Joinder in Motion to Dismiss by the OEC Defendants (Doc. 29),, 29 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF JURISDICTION filed by Plaintiff Susan B. Anthony List. (Woudenberg, Anita) (Entered: 02/24/2011)

02/24/2011 33 MOTION for Summary Judgment by Plaintiff Susan B. Anthony List. Responses due by 3/21/2011 (Attachments: # 1 Memorandum Supporting Summary Judgment, # 2 Exhibit Exhibit 11: OEC Order Dismissing Driehaus Complaints)

(Woudenberg, Anita) (Entered: 02/24/2011)

02/24/2011 34 MOTION for Summary Judgment Against Driehaus Counterclaim for Defamation by Counter Defendant Susan B. Anthony List. Responses due by 3/21/2011 (Attachments: # 1 Memorandum Supporting Summary Judgment Motion Against Defamation Counterclaim, # 2 Exhibit Exhibit 1: First Affidavit of SBA List, # 3 Exhibit Exhibit 2: Second Affidavit of SBA List) (Woudenberg, Anita) (Entered: 02/24/2011)

02/24/2011 35 RESPONSE in Opposition re 30 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF JURISDICTION filed by Plaintiff Coalition Opposed To Additional Spending & Taxes. (Attachments: # 1 Exhibit A - George Will article, "A Tale of Two Bad Laws: Obamacare collides with Ohios regulation of the truth.", # 2 Exhibit B - Federal Election Commission Opinion No. 1978-24, # 3 Exhibit C - Federal Election Commission Opinion No. 1980-36, # 4 Exhibit D – Federal Election Commission Opinion No. 1981-27, # 5 Exhibit E - Federal Election Commission Opinion No. 1986-11) (Hartman, Curt)

(Entered: 02/24/2011)

* * *

03/14/2011	46	REPLY to Response to Motion re 29 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF JURISDICTION Against Amended Complaint of Plaintiff Susan B. Anthony List On Threshold Jurisdictional Issues filed by Defendants Charles Calvert, Bryan Felmet, John Mroczkowski, Ohio Elections Commission, Philip Richter, Harvey Shapiro, Jayme Smoot, Degee Wilhelm, Larry Wolpert. (Gale, Erick) (Entered: 03/14/2011)

* * *

03/28/2011	49	MOTION to Dismiss for Lack of Jurisdiction by Defendant Jon Husted. Responses due by 4/21/2011 (Coglianese, Richard) (Entered: 03/28/2011)

* * *

04/12/2011	50	RESPONSE in Opposition re 33 MOTION for Summary Judgment filed by Defendants Charles Calvert, Bryan Felmet, John Mroczkowski, Ohio Elections Commission, Philip Richter, Harvey Shapiro, Jayme Smoot, Degee Wilhelm, Larry Wolpert. (Attachments: # 1 Exhibit A State's

		Response to Pltfs Proposed Statement of Facts, # 2 Exhibit B Cincinnati.com Article-Driehaus moving to Africa, # 3 Exhibit C Declaration of Erick Gale/Email Correspondence) (Gale, Erick) (Entered: 04/12/2011)
04/12/2011	51	REPLY to Response to Motion re 30 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF JURISDICTION filed by Defendants Charles Calvert, Bryan Felmet, John Mroczkowski, Ohio Elections Commission, Philip Richter, Harvey Shapiro, Jayme Smoot, Degee Wilhelm, Larry Wolpert. (Attachments: # 1 Exhibit A Cincinnati.com-Driehaus moving to Africa) (Gale, Erick) (Entered: 04/12/2011)
04/12/2011	52	RESPONSE in Opposition re 33 MOTION for Summary Judgment filed by Defendant Jon Husted. (Coglianese, Richard) (Entered: 04/12/2011)
04/12/2011	53	RESPONSE in Opposition re 34 MOTION for Summary Judgment Against Driehaus Counterclaim for Defamation filed by Counter Claimant Steve Driehaus. (Attachments: # 1 Affidavit of Steve Driehaus, Pt. 1, # 2 Affidavit of Steve Driehaus, Pt. 2, # 3 Affidavit

of Paul M. De Marco Pursuant to Fed.R.Civ.P. 56(d), # 4 Exhibit 1, # 5 Exhibit 2, # 6 Exhibit 3, # 7 Exhibit 4, # 8 Exhibit 5, # 9 Exhibit 6) (De Marco, Paul) (Entered: 04/12/2011)

* * *

04/21/2011 56 RESPONSE in Opposition re 49 MOTION to Dismiss for Lack of Jurisdiction filed by Plaintiff Susan B. Anthony List. (La Rue, Joseph) Modified to insert hyperlink on 4/22/2011 (lk). (Entered: 04/21/2011)

* * *

04/29/2011 58 REPLY to Response to Motion re 34 MOTION for Summary Judgment Against Driehaus Counterclaim for Defamation filed by Counter Defendant Susan B. Anthony List. (Attachments: # 1 Exhibit Exhibit 3) (La Rue, Joseph) (Entered: 04/29/2011)

04/29/2011 59 REPLY to Response to Motion re 33 MOTION for Summary Judgment filed by Plaintiff Susan B. Anthony List. (La Rue, Joseph) (Entered: 04/29/2011)

* * *

05/02/2011 61 RESPONSE in Opposition re 49 MOTION to Dismiss for Lack of Jurisdiction filed by Plaintiff Coalition Opposed To Additional Spending & Taxes. (Hartman,

Curt) (Entered: 05/02/2011)

* * *

05/16/2011 62 REPLY to Response to Motion re 49 MOTION to Dismiss for Lack of Jurisdiction filed by Defendant Jon Husted. (Coglianese, Richard) (Entered: 05/16/2011)

* * *

08/01/2011 64 ORDER GRANTING DEFENDANTS OHIO ELECTION COMMISSION AND ITS MEMBERS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT OF THE COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES (Doc. 30). Signed by Judge Timothy S. Black on 8/1/11. (mr1) (Entered: 08/01/2011)

08/01/2011 65 ORDER: (1) GRANTING DEFENDANT OHIO ELECTION COMMISSION AND ITS MEMBERS' MOTION TO DISMISS SUSAN B. ANTHONY LIST'S AMENDED COMPLAINT (Doc 29); (2) GRANTING DEFENDANT DRIEHAUS'S MOTION TO DISMISS (Doc. 31); (3) GRANTING DEFENDANT JON HUSTED'S MOTION TO DISMISS (Doc. 49); and (4) DENYING PLAINTIFF SBA LIST'S MOTION FOR SUMMARY JUDGMENT (Doc. 33). Signed by

		Judge Timothy S. Black on 8/1/11. (mr1) (Entered: 08/01/2011)
08/01/2011	66	ORDER DENYING PLAINTIFF SUSAN B. ANTHONY LIST'S MOTION FOR SUMMARY JUDGMENT ON DEFAMATION (Doc. 34). Signed by Judge Timothy S. Black on 8/1/11. (mr1) (Entered: 08/01/2011)
08/03/2011	67	ENTRY OF JUDGMENT FOR ALL DEFENDANTS ON ALL COUNTS OF PLAINTIFF'S SECOND AMENDED COMPLAINT (Doc. 25). Signed by Judge Timothy S. Black on 8/2/11. (mr1) (Entered: 08/03/2011)
08/03/2011	68	ENTRY OF JUDGMENT FOR DEFENDANT OHIO ELECTION COMMISSION AND ITS MEMBERS ON ALL COUNTS OF PLAINTIFF'S SECOND AMENDED COMPLAINT (Doc. 26). Signed by Judge Timothy S. Black on 8/2/11. (mr1) (Entered: 08/03/2011)
		* * *
08/17/2011	69	NOTICE OF APPEAL as to 65 Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Summary Judgment, Order on Motion to Dismiss/Lack of Jurisdiction,,,, by Plaintiff Susan B. Anthony List. Filing fee $ 455. (La Rue, Joseph) (Entered: 08/17/2011)

* * *

08/25/2011	71	NOTICE OF APPEAL as to 64 Order on Motion to Dismiss for Failure to State a Claim, 68 Judgment by Plaintiff Coalition Opposed To Additional Spending & Taxes. Filing fee $ 455, receipt number 0648-3306198. (Hartman, Curt) (Entered: 08/25/2011)

* * *

08/10/2012	95	MOTION for Protective Order by Counter Defendant Susan B. Anthony List. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F) Associated Cases: 1:10-cv-00720-TSB, 1:10-cv-00754-TSB (Carvin, Michael) (Entered: 08/10/2012)

* * *

05/14/2013	112	USCA OPINION (Information Copy) re 69 Notice of Appeal and 71 Notice of Appeal: We AFFIRM the district court's decision to dismiss these suits. Mandate to issue. (mtw) (Entered: 05/14/2013)

* * *

08/20/2013	115	Notice from Supreme Court of the United States. The petition for a writ of certiorari was filed on August 9, 2013 and placed on the docket on August 13, 2013 as case number 13-193. (mtw) (Entered: 08/20/2013)

General Docket

United States Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 11-3894 **Docketed:** 08/19/2011
Nature of Suit: 3440 Civil Rights: Other **Termed:** 05113/2013
Susan List v. Steven Driehaus, at al
Appeal From: Southern District of Ohio at Cincinnati
Fee Status: fee paid
Case Type Information:
1) Civil
2) Private
3) Civil Rights
Originating Court Information:
District: 0648-1: 1:10-CV-720
Trial Judge: Timothy S. Black, U.S. District Judge

Date Filed: 10/18/2010 **Date NOA Filed:** 08/17/2011
Date Order/Judgment: 08/01/2011

Lead: 1:10-CV-720
District: 0648-1: 1:10-cv-00754
Trial Judge: Timothy S. Black, U.S. District Judge
Date Filed: 10/27/2010
Date Order/Judgment: 08/01/2011 **Date NOA Filed:** 08/17/2011

SUSAN B. ANTHONY LIST

Plaintiff – Appellant

v.

STEVEN DRIEHAUS; JOHN MROCZKOWSKI; BRYAN FELMET; JAYME SMOOT; HARVEY SHAPIRO; DEGEE WILHELM; LARRY WOLPERT; PHILIP RICHTER; CHARLES CALVERT; OHIO ELECTIONS COMMISSION; JON HUSTED

Defendants – Appellees

08/19/2011	3 pg, 12.84 KB	Civil Case Docketed. Notice filed by Appellant Susan B. Anthony List. Transcript needed: n. (MMD)
		* * *
10/04/2011	47 pg, 244.34 KB	APPELLANT BRIEF filed by Ms. Anita Yvonne Woudenberg for Susan B. Anthony List. Certificate of Service: 10/04/2011. Argument Request: requested. (AYM)
11/07/2011	61 pg, 219.53 KB	APPELLEE BRIEF filed by Mr. Erick D. Gale for Ohio Elections Commission, Bryan Felmet, Mr. Larry Wolpert, John Mroczkowski, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Philip Richter and Charles Calvert. Certificate of Service: 11/07/2011. Argument Request: requested. (EDG)
11/07/2011	61 pg,	APPELLEE BRIEF filed by Mr.

	220.59 KB	Richard N. Coglianese for Jon Husted. Certificate of Service: 11/07/2011. Argument Request: requested. (RNC)
11/07/2011	26 pg, 308.2 KB,	APPELLEE BRIEF filed by Mr. Paul Michael De Marco for Stewn Driehaus. Certificate of Service: 11/07/2011. Argument Request: requested. (PMD)
11/23/2011	29 pg, 145.43 KB	REPLY BRIEF filed by Attorney Ms. Anita Yvonne Woudenberg for Appellant Susan B. Anthony List. Certificate of S:11/23/2011. (AYM)
03/05/2012	0 pg, 0 KB	LETTER filed by Ms. Anita Yvonne Woudenberg for Susan B. Anthony List regarding 28(j) *Supplemental Authority*. Certificate of Service: 03/05/2012. ***COUNSEL directed to refile as an additional citation****- [Edited 03/0512012 by PJE] (AYM)
03/05/2012	32 pg, 516.14 KB	ADDITIONAL CITATION filed by Ms. Anita Yvonne Woudenberg for Susan B. Anthony List. Certificate of Service: 03/0512012. (AYM)
04/02/2012	1 pg, 69.71 KB	RESPONSE in opposition filed regarding an additional citation, [4566684-2]. Response from Attorney Mr. Erick D. Gale for Appellees Ohio Elections Commission, Bryan Felmet, Mr. Larry Wolpert, John

		Mroczkowski, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Philip Richter and Charles Calvert. Certificate of Service: 04/02/2012. (EDG)
05/04/2012	3 pg, 14.05 KB	Oral argument date set for 9:00 am July 25, 2012. Notice of argument sent to counsel on 05/04/2012. (DC)
		* * *
07/25/2012		CAUSE ARGUED by Mr. Michael Anthony Carvin for Appellant Susan B. Anthony List, Mr. Richard N. Coglianese for Appellees Ohio Elections Commission, Bryan Felmet, Mr. Larry Wolpert, John Mroczkowski, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Philip Richter, Charles Calvert and Jon Husted and Mr. Paul Michael De Marco for Appellee Stewn Driehaus before Rogers, Circuit Judge; Stranch, Circuit Judge and Pearson, U.S. District Judge. (KSC)
		* * *
07/31/2012	22 pg, 7.13 KB	ADDITIONAL CITATION filed by Mr. Michael Anthony Carvin for Susan B. Anthony List. Certificate of Service: 07/31/2012. (MAC)
08/08/2012	16 pg, 2.05 KB	ADDITIONAL CITATION filed by Mr. Michael Anthony Carvin for Susan B. Anthony List.

		Certificate of Service: 08/0812012. (MAC)
05/13/2013	16 pg, 2.77 KB	OPINION: the district court's decision to dismiss these suits is AFFIRMED, decision not for publication. John M. Rogers, Circuit Judge; Jane Branstetter Stranch, AUTHORING Circuit Judge and Benita Y. Pearson, U.S. District Judge for the Northern District of Ohio, sitting by designation. [11-3894, 11-3925] (LAJ)
06/04/2013	2 pg, 11.29 KB	MANDATE ISSUED with no costs taxed. (MMD)
08/19/2013	1 pg, 68.97 KB	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellant Susan B. Anthony List. Supreme Court Case No: 13-193, 08/09/2013. (CL)
01/13/2014	78.24 KB	U.S. Supreme Court letter filed granting the petition for a writ of certiorari [4920648-2] filed by Susan B. Anthony List.. Supreme Court Case No: 13-193, 01/10/2014.. (CL)

Court of Appeals Docket #:11-3925 **Docketed:** 08/26/2011
Nature of Suit: 3440 Civil Rights: Other **Termed:** 05/13/2013
Susan List, et al. v. Steven Driehaus, et al
Appeal From: Southern District of Ohio at Cincinnati
Fee Status: fee paid
Case Type Information:
1) Civil
2) Private
3) Civil Rights

SUSAN B. ANTHONY LIST

Plaintiff

and

COALITION OPOSSED TO ADDITIONAL SPENDING & TAXES

Plaintiff - Appellant

v.

STEVEN DRIEHAUS

Defendant

and

JOHN MROCZKOWSKI; BRYAN FELMET; JAYME SMOOT; HARVEY SHAPIRO; DEGEE WILHELM; LARRY WOLPERT; PHILIP RICHTER; CHARLES CALVERT; OHIO ELECTIONS COMMISSION; JON HUSTED

Defendants – Appellees

* * *

10/11/2011	53 pg, 427.67 KB	APPELLANT BRIEF filed by Mr. Curt C. Hartman for Coalition Opossed to Additional Spending & Taxes. Certificate of Service: 10/11/2011. Argument Request: requested. (CCH)
11/10/2011	51 pg, 194.23 KB	APPELLEE BRIEF filed by Mr. Erick D. Gale for Ohio Elections Commission, Bryan Felmet, Mr. Larry Wolpert, John Mroczkowski, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Philip Richter and Charles Calvert. Certificate of Service: 11/10/2011. Argument Request: requested. (EDG)
11/28/2011	20 pg, 200.84 KB	REPLY BRIEF filed by Attorney Mr. Curt C. Hartman for Appellant Coalition Opossed to Additional Spending & Taxes. Certificate of Service: 11/2812011. (CCH)
05/04/2012	2 pg, 13.41 KB	Oral argument date set for 9:00 am July 25, 2012. Notice of argument sent to counsel on 05104/2012. (DC)

* * *

06/28/2012	2 pg, 83.38 KB	ADDITIONAL CITATION filed by Mr. Curt C. Hartman for Coalition Opossed to Additional Spending & Taxes. Certificate of Service: 06/2812012. (CCH)
06/28/2012	26 pg, 548.08 KB	MOTION filed by Mr. Curt C. Hartman for Coalition Opossed to Additional Spending & Taxes to take judicial notice. Certificate of Service: 06/2812012. (CCH)
		* * *
07/25/2012		CAUSE ARGUED by Mr. Curt C. Hartman for Appellant Coalition Opossed to Additional Spending & Taxes and Mr. Richard N. Coglianese for Appellees Ohio Elections Commission, Bryan Felmet, Mr. Larry Wolpert, John Mroczkowski, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Philip Richter, Charles Calvert and Jon Husted before Rogers, Circuit Judge; Stranch, Circuit Judge and Pearson, U.S. District Judge. (KSC)
05/13/2013	16 pg, 142.77 KB	OPINION: the district court's decision to dismiss these suits is AFFIRMED,

		decision not for publication. John M. Rogers, Circuit Judge; Jane Branstetter Stranch, AUTHORING Circuit Judge and Benita Y. Pearson, U.S. District Judge for the Northern District of Ohio, sitting by designation. [11-3894, 11-3925] (LAJ)
		* * *
05/29/2013	58 pg, 500.46 KB	PETITION for en banc rehearing filed by Mr. Curt C. Hartman for Coalition Opossed to Additional Spending & Taxes. Certificate of Service: 0512812013. (CCH)
06/26/2013	2 pg, 96.34 KB	ORDER filed denying petition for en banc rehearing [4866565-2] filed by Mr. Curt C. Hartman. John M. Rogers and Jane Branstetter Stranch, Circuit Judges; and Benita Y. Pearson, District Judge. (BLH)
07/05/2013	3 pg, 11.74 KB	MANDATE ISSUED with no costs taxed. (CL)
08/19/2013	1 pg, 78.16 KB	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by. Supreme Court Case No: 13-193, 08109/2013. (CL)

01/13/2014	1 pg, 78.24 KB	U.S. Supreme Court letter filed granting petition certiorari petition [5014447-21].. Supreme Court Case No: 13-193, 01/10/2014.. (CL)

WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A
ATTORNEYS & COUNSELLORS AT LAW
1513 FOURTH & VINE TOWER
ONE WEST FOURTH STREET
CINCINNATI, OHIO 45202
TELEPHONE (513) 621-0267

PAUL M. DE MARCO
FAX (513) 381-2375
FAX (513) 621-0262

October 4, 2010

Wendi Loup, Esq.
Assistant General Counsel
Lamar Advertising Company
5551 Corporate Blvd.
Baton Rouge, Louisiana 70808

Re: Standstill Agreement

Dear Wendi:

This letter confirms our agreement that Lamar Advertising Company has ceased—and will continue to suspend—the posting of billboard advertisements by the Susan B. Anthony List that falsely accuse Congressman Steve Driehaus of "vot[ing] FOR taxpayer-funded abortion," until the Ohio Elections Commission rules on the Complaint that I will file with the Commission on Tuesday, October 5, 2010. Our Complaint will allege that the statement quoted above is a violation of Ohio Revised Code §§ 3517.21(B)(9) and (10).

In exchange for your agreement that Lamar will not post the billboards until the Ohio Elections Commission rules on our Complaint, I agreed that

our Complaint will not join Lamar as a respondent and will not allege that Lamar has violated Ohio Revised Code §§ 3517.21 (B)(9) and (10). Of course, if Lamar posts these or similarly worded advertisements in violation of our agreement or after the Ohio Elections Commission rules, we reserve the right to proceed against Lamar before the Ohio Elections Commission and/or in a court of law.

This letter also confirms that I have promised to keep you informed of the date and the result of the probable cause hearing on our Complaint. Thank you for your efforts in reaching this agreement, Wendi.

Sincerely,

WAITE, SCHNEIDER,
BAYLESS & CHESLEY
CO., L.P.A.

/s/ Paul M. De Marco
Paul M. De Marco

cc: Hon. Steve Driehaus

Exhibit 2

OHIO ELECTIONS COMMISSION

STEVE DRIEHAUS
3502 Boudinot Avenue
Cincinnati, Ohio 45211
Phone: (513) 662-0205
Fax: (866) 675-6306

Case No. _____

Complainant,

vs.

COMPLAINT UNDER O.R.C. § 3517.153(A), WITH SUPPORTING AFFIDAVITS

SUSAN B. ANTHONY LIST
1717 L Street NW, Suite 750
Washington, DC 20036
Phone: (202) 223-8073
Fax: (202) 223-8078

Respondent.

Complainant Steve Driehaus files this Complaint pursuant to Ohio Revised Code ("O.R.C.") § 3517.153(A), setting forth alleged violations of O.R.C. §§ 3517.21(B)(9) and (10) and O.R.C. § 3517.20 by Respondent Susan B. Anthony List ("SBA List"). Attached to this Complaint are the Affidavit of Steve Driehaus, as well as supporting affidavits from Democrats for Life and Catholics United, attesting to the facts constituting the alleged violations, based on personal knowledge. The relevant facts are set forth below and in the attached affidavits, with accompanying exhibits.

Steve Driehaus is a member of the United States House of Representatives. He represents Ohio's First Congressional District. He is a candidate for reelection on November 2, 2010.

Congressman Driehaus, a Democrat, is well-known in the First Congressional District as an opponent of abortion.

Attached hereto as Exhibit A is a political publication and advertisement disseminated by Respondent SBA List, which falsely states that Congressman Driehaus "voted FOR taxpayer-funded abortion."

The statement does not say which legislation Respondent is referring to, but based on other press releases issued by Respondent, we infer the SBA List is referring to the health care reform legislation, which Congressman Driehaus voted for on March 21, 2010, and which the President signed into law as the Patient Protection and Affordable Care Act ("PPACA").

Shortly after signing the PPACA, the President issued Executive Order 13535, attached hereto as

Exhibit B, which has the force of law governing federal expenditures under the PPACA. Executive Order 13535 is intended "to establish a comprehensive, Government-wide set of policies and procedures . . . to make certain that all relevant actors—Federal officials, State officials (including insurance regulators) and health care providers—are aware of their responsibilities" under the PPACA.

Both the PPACA and Executive Order 13535 contain provisions ensuring that there will be no taxpayer-funded abortions as a result of the passage of the PPACA. The PPACA provides for "enhanced funding" to community health centers, but none of it legally can be spent on abortion services. The PPACA also makes provision for tax credits and cost-sharing reductions (equating to subsidies) to individuals and businesses to facilitate the purchase of insurance coverage through exchanges created by the PPACA, but mandatory segregation provisions in the PPACA, which are binding on both issuers and enrollees, ensure that no funding associated with them can pay for abortions.

In the time leading up to passage of the PPACA, Congressman Driehaus consistently advocated—in public and in private, including in conversations with the President and other Members of Congress—for language stating that the funding provided for in the PPACA would be subject to the longstanding federal ban on taxpayer-funded abortions, as first stated in the 1976 Hyde Amendment. In an op-ed piece published in the *Community Press* in July 2010, Congressman Driehaus described his efforts to ensure that the PPACA did *not* result in taxpayer-funded abortions. Exhibit C.

Congressman Driehaus and like-minded pro-life Democratic members of the House of Representatives were successful in securing language in both the PPACA and Executive Order 13535, ensuring that the PPACA would not permit or be construed as permitting taxpayer-funded abortions. As Executive Order 13535 states, the PPACA "maintains" the current federal restrictions under the Hyde Amendment "and extends those restrictions to the newly created health insurance exchanges," which begin in 2014. Exhibit B.

Many organizations supported the health care reform legislation that became the PPACA *because* Congressman Driehaus and other Democratic members of the House of Representatives were successful in securing commitments that there would be language making clear the law would not permit or be construed as permitting taxpayer-funded abortions. *See* Affidavits of Kristen Day and James Salt, attached as Exhibits D and E.[1]

Despite the fact that the PPACA does not permit and in fact prohibits taxpayer-funded abortions, the SBA List and other groups opposed to Congressman Driehaus's reelection have published and disseminated the false statement about Congressman Driehaus contained in Exhibits A and F, with the avowed purpose of defeating him on November 2, 2010. For example, on August 9, 2010, the SBA List issued a press release stating that it would launch a 23-city bus tour with the message that "votes have

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[1] Attached are faxed copies of these supporting affidavits. Originals will be filed with the Commission once they are received.

consequences." Exhibit F. This press release indicated that the tour would "focus on educating voters that their representative voted for a health care bill that includes taxpayer-funded abortion and betrayed their pro-life constituents." *Id.* The release also stated that the SBA List is "focusing its efforts in the districts of so-called 'pro-life' Democrats," including "Steve Driehaus," quoting SBA List Project Director Marilyn Musgrave's promise that "'Votes have consequences and, for these pro-life betrayers, it will be a quick downhill slide to defeat in November.'" *Id.*

On September 28, 2010, a report in the online version of the *Cincinnati Enquirer* stated that the SBA List had announced it would put up four billboards in the Cincinnati area attacking Congressman Driehaus. Exhibit G. The *Enquirer* report indicated that the billboards will go up on or about October 4, 2010 and stay up through at least October 31, 2010. *Id.* The *Enquirer* report included a photo of the billboards the SBA List intends to put up, which is identical to Exhibit A. It depicts Congressman Driehaus with the bold, all-capital headline "SHAME ON STEVE DRIEHAUS!" and the following underneath: "Driehaus voted FOR taxpayer-funded abortion." *Id.*

Respondent's statements in its advertisements, press releases, announcements of the planned billboards, and other communications falsely assert that Congressman Driehaus voted "FOR taxpayer-funded abortions," when in fact he consistently has opposed taxpayer-funded abortions and the net effect of his efforts and advocacy was a federal law, backed up by a Presidential Executive Order and reaffirmed

by agency action, that actually prohibits the government, its agencies, and all relevant actors from using federal funds provided for under the law to pay for abortions.

These statements violate O.R.C. § 3517.21(B)(9), which prohibits a person during the course of campaign from "[m]ak[ing] a false statement concerning the voting record of a candidate or public official." They also violate O.R.C. § 3517.21(B)(10), which makes it a violation to "[p]ost, publish, circulate, distribute or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard for whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." Respondent is well aware that its statements about Congressman Driehaus's voting record in Exhibits A and F are false, or it has made them with reckless disregard for their falsity. It has made and repeated these false statements for its own partisan political reasons, *i.e.*, to promote the election of Congressman Driehaus's opponent, Steve Chabot, and, thus, the defeat of Congressman Driehaus.

Pursuant to O.R.C. § 3517.20(A)(1), respondent's actions in disseminating and publishing these statements also constitute issuing political publications against a candidate as well as making expenditures for the purpose of financing political communications in opposition to a candidate through public political advertising. As such, they violate O.R.C. § 3517.20, insofar as they fail to contain the disclaimers and other information required by that section.

Congressman Driehaus respectfully requests an expedited hearing pursuant to O.R.C. §§ 3517.154(A)(2)(a) and 3517.156(B)(1), given the nature of the violations and the fact that this Complaint is being filed after the ninetieth day prior to the general election. Congressman Driehaus also respectfully requests that the Commission find that respondent has violated O.R.C. §§ 3517.21(B)(9) and (10), as well as O.R.C. § 3517.20.

Respectfully submitted,

/s/ Paul M. De Marco
Paul M. De Marco (0041153)
W.B. Markovits (0018514)
Waite, Schneider, Bayless & Chesley Co., L.P.A.
1513 Fourth & Vine Street
Cincinnati, OH 45202
Telephone: (513) 621-0267
Fax: (513) 621-0262

AFFIDAVIT OF STEVE DRIEHAUS

COUNTY OF HAMILTON)
STATE OF OHIO) **ss:**

Steve Driehaus, being first duly cautioned and sworn, states as follows:

1. I am the Complainant in this case, and a Member of the United States House of Representatives. I represent Ohio's First Congressional District, and am a candidate for reelection on November 2, 2010. I am a Democrat and well-known in my District as an opponent of abortion.

2. Exhibit A to the accompanying Complaint is a political publication and advertisement disseminated by the Susan B. Anthony List ("SBA List"), which states that I "voted FOR taxpayer-funded abortion." Exhibit F to the accompanying Complaint is a press release issued by the SBA List, which repeats the statement that I "voted for a health care bill that includes taxpayer-funded abortion ...." These statement are false. The health care reform legislation for which I voted, now known as the Patient Protection and Affordable Care Act ("PPACA"), does not provide for taxpayer-funded abortions. It prohibits the use of federal funding provided for in the Act to pay for abortions, as does Presidential Executive Order 13535. *See* Exhibit B to the accompanying Complaint. The SBA List is on record as having committed to my defeat on November 2, 2010. *See* Exhibit F to the accompanying Complaint.

3. Throughout my career in Congress and prior to it, I have consistently opposed taxpayer-funded

abortions. In the time leading up to passage of the PPACA, I consistently advocated—in public and in private, including in conversations with the President and other Members of Congress—for language stating that the funding provided for in the PPACA would be subject to the longstanding federal ban on taxpayer-funded abortions, as first stated in the 1976 Hyde Amendment. I was among a group of pro-life Democratic members of the House of Representatives whose efforts resulted in passage of the PPACA and the signing of Presidential Executive Order 13535, which included language that maintains that policy against taxpayer-funded abortions and extends it to the new insurances exchanges created by the PPACA, which begin in 2014. In an op-ed piece published this summer in the *Community Press* (*see* Exhibit C to the accompanying Complaint), I recounted my efforts and my consistent position in opposition to taxpayer- funded abortions.

4. Based on my personal knowledge of their falsity, the statements made by the SBA List about my voting record violate O.R.C. §§ 3517.21(B)(9) and (10).

5. I make this affidavit based on my personal knowledge, and declare under penalty of perjury that it its true and correct. Further affiant sayeth naught.

/s/ Steve Driehaus
Steve Driehaus

Signed and sworn before a Notary Public this 4th day of October, 2010, in Cincinnati, Ohio.

/s/ Paul De Marco
Notary Public

PAUL DE MARCO
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.

SHAME ON
STEVE DRIEHAUS!
Driehaus voted FOR taxpayer-funded abortion.

EXHIBIT
A

Monday,
March 29, 2010

Part IV

The President

Executive Order 13535—Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act

Federal Register

EXHIBIT
B

Federal Register **Presidential Documents**
Vol. 75, No. 59
Monday, March 29, 2010

Title 3— Executive Order 13535 of March 24, 2010

The President **Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the "Patient Protection and Affordable Care Act" (Public Law 111-148), I hereby order as follows:

Section. 1. *Policy.* Following the recent enactment of the Patient Protection and Affordable Care Act (the "Act"), it is necessary to establish an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), consistent with a longstanding Federal statutory restriction that is commonly known as the Hyde Amendment. The purpose of this order is to establish a comprehensive, Government-wide set of policies and procedures to achieve this goal and to make certain that all relevant actors—Federal officials, State officials (including insurance regulators) and health care providers—are aware of their responsibilities, new and old.

The Act maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health

insurance exchanges. Under the Act, longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a–7, and the Weldon Amendment, section 508(d)(1) of Public Law 111–8) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.

Numerous executive agencies have a role in ensuring that these restrictions are enforced, including the Department of Health and Human Services (HHS), the Office of Management and Budget (OMB), and the Office of Personnel Management

Sec. 2. *Strict Compliance with Prohibitions on Abortion Funding in Health Insurance Exchanges.* The Act specifically prohibits the use of tax credits and cost-sharing reduction payments to pay for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered) in the health insurance exchanges that will be operational in 2014. The Act also imposes strict payment and accounting requirements to ensure that Federal funds are not used for abortion services in exchange plans (except in cases of rape or incest, or when the life of the woman would be endangered) and requires State health insurance commissioners to ensure that exchange plan funds are segregated by insurance companies in accordance with generally accepted accounting principles, OMB funds management circulars, and accounting guidance provided by the Government Accountability Office.

I hereby direct the Director of the OMB and the Secretary of HHS to develop, within 180 days of the

date of this order, a model set of segregation guidelines for State health insurance commissioners to use when determining whether exchange plans are complying with the Act's segregation requirements, established in section 1303 of the Act, for enrollees receiving Federal financial assistance. The guidelines shall also offer technical information that States should follow to conduct independent regular audits of insurance companies that participate in the health insurance exchanges. In developing these model guidelines, the Director of the OMB and the Secretary of HHS shall consult with executive agencies and offices that have relevant expertise in accounting principles, including, but not limited to, the Department of the Treasury, and with the Government Accountability Office. Upon completion of those model guidelines, the Secretary of HHS should promptly initiate a rulemaking to issue regulations, which will have the force of law, to interpret the Act's segregation requirements, and shall provide guidance to State health insurance commissioners on how to comply with the model guidelines.

Sec. 3. *Community Health Center Program.* The Act establishes a new Community Health Center (CHC) Fund within HHS, which provides additional Federal funds for the community health center program. Existing law prohibits these centers from using Federal funds to provide abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), as a result of both the Hyde Amendment and longstanding regulations containing the Hyde language. Under the Act, the Hyde language shall apply to the authorization and appropriations of funds for Community Health

Centers under section 10503 and all other relevant provisions. I hereby direct the Secretary of HHS to ensure that program administrators and recipients of Federal funds are aware of and comply with the limitations on abortion services imposed on CHCs by existing law. Such actions should include, but are not limited to, updating Grant Policy Statements that accompany CHC grants and issuing new interpretive rules.

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect: (i) authority granted by law or Presidential directive to an agency, or the head thereof; or (ii) functions of the Director of the OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees or agents, or any other person.

/s/ Barack Obama

THE WHITE HOUSE

Washington, March 24, 2010.

(FR Doc. 2010–7154
Filed 3-26-10; 1:00 p.m.)

The Executive Order Is Working

By Representative Steve Driehaus

Only a few months since the President signed the new health reform law, it is already clear that our work to prevent the use of taxpayer dollars for abortion is paying off. Before the House of Representatives cast its final vote for health care reform, I worked with other pro-life Democrats to secure a commitment from the President to sign an executive order clarifying and enforcing long-standing law banning the use of federal funds for abortion services. Even though executive orders carry the full force of law, opponents of reform who wanted to see the law fail have used the issue of abortion to launch political attacks, claiming that the executive order wasn't worth the paper it was written on.

Now that the executive order has been put to its first test, however, it's clear that it is working precisely as promised. Earlier this month, concerns arose that state-run high-risk insurance pools in Pennsylvania and New Mexico could possibly cover elective abortion services. In response to these concerns, the U.S. Department of Health and Human Services (HHS) issued this clear and unequivocal statement:

"As is the case with [Federal Employee Health Benefit] plans currently, and with the Affordable Care Act and the President's related Executive Order more generally, in Pennsylvania and in all other states abortions will not be covered in the Pre-existing Condition Insurance Plan (PCIP) except in the cases of rape or incest, or where the life of the woman would be endangered."

While some pro-life groups distorted the situation in order to mislead the public, the facts simply aren't on their side. According to the Associated Press, opponents of abortion have "scored a victory," and the Catholic bishops welcomed the HHS announcement. On the other hand, NARAL Pro-Choice America, a leading advocate for access to abortion services, called the decision "wrongheaded."

I made a commitment to ensure that no federal tax dollars would be used for abortion. That's why I fought so hard for an executive order that is consistent with pro-life values. There were doubts whether the executive order was strong enough to restrict that funding. With this application of the executive order, those doubts can be put to rest.

The reform that I supported protects the unborn, and will support and foster the health and security of millions of others. That is a true success for a pro-life agenda that promotes life from conception until natural death. As more and more states implement high-risk pools, and as other provisions of the Affordable Care Act are implemented, the recent decision by HHS sets an important precedent and inspires confidence that health care reform protects the sanctity of life at all stages.

AFFIDAVIT OF KRISTEN DAY

Kristen Day, being first duly cautioned and sworn, states as follows:

1. I am the Executive Director of Democrats for Life and, in that capacity, I am required to be, and am, familiar with the voting record of Congressman Steve Driehaus. I am aware that the Susan B. Anthony List ("SBA List") has disseminated publications, press releases, advertisements, and other communications in which it states that Congressman Driehaus "voted FOR taxpayer-funded abortion." In my capacity as Executive Director of Democrats for Life, I am required to be, and am, aware of the provisions of the health care reform legislation for which Congressman Driehaus voted, which is now known as the Patient Protection and Affordable Care Act ("PPACA"). The statements made by the SBA List (*see* Exhibits A and F to the accompanying Complaint) about Congressman Driehaus's voting record are false. The PPACA does not mandate taxpayer-funded abortions. Actually, it contains provisions prohibiting taxpayer-funded abortions. In part because this language was included in the bill, Democrats for Life advocated for passage of the legislation.

2. I make this affidavit based on my personal knowledge and declare under penalty of perjury that it is true and correct. Further affiant sayeth naught.

/s/ Kristen Day
Kristen Day

Signed and sworn before a Notary Public this 4th day of October, 2010, in Commonwealth of Virginia County of Fairfax

/s/ Mallory Rascher
Notary Public
Notary Reg #7155068
My commission Expires:
2/28/2012

AFFIDAVIT OF JAMES SALT

James Salt, being first duly cautioned and sworn, states as follows:

1. I am the Policy Director of Catholics United and, in that capacity, I am required to be, and am, familiar with the voting record of Congressman Steve Driehaus. I am aware that the Susan B. Anthony List ("SBA List") has disseminated publications, press releases, advertisements, and other communications in which it states that Congressman Driehaus "voted FOR taxpayer-funded abortion." In my capacity as Policy Director of Catholics United, I am required to be, and am, aware of the provisions of the health care reform legislation for which Congressman Driehaus voted, which is now known as the Patient Protection and Affordable Care Act ("PPACA"). The statements made by the SBA List (*see* Exhibits A and F to the accompanying Complaint) about Congressman Driehaus's voting record are false. The PPACA does not provide for taxpayer-funded abortions. Actually, it contains provisions prohibiting taxpayer-funded abortions. In part because this language was included in the bill, Catholics United advocated for passage of the legislation.

2. I make this affidavit based on my personal knowledge and declare under penalty of perjury that it is true and correct. Further affiant sayeth naught.

/s/ James Salt 10/4/10
James Salt

EXHIBIT
E

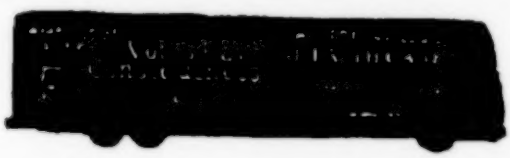
Signed and sworn before a Notary Public this 4th day of October, 2010, in Washington, D.C.

/s/ Regina Brantley
Notary Public

Notary Public, District of Columbia
My Commission Expires
May 14, 2015

Home>Learn>SBA List in the Press>Press Releases

SBA List Launches "Votes Have Consequences" Bus Tour: Abortion is NOT Health Care



* * MEDIA ADVISORY * *

FOR IMMEDIATE RELEASE: August 9, 2010

CONTACT: Kerry Brown at 703-470-1926 or kbrown@sba-list.org

SBA LIST LAUNCHES 'VOTES HAVE CONSEQUENCES' BUS TOUR: ABORTION IS NOT HEALTH CARE

First Day Brings Tour to Districts of Reps. Steve Driehaus (OH-01), Brad Ellsworth (IN-Senate), and Joe Donnelly (IN-02)

OHIO & INDIANA—on Tuesday August 10, 2010 the Susan B. Anthony List's *Votes Have Consequences* Bus Tour will make its first stops in Cincinnati, OH; Muncie, Fort Wayne, and Elkhart, Indiana, as part of a 23-city tour and national voter education effort in the home districts of Members of Congress with the message that "votes have consequences." Each tour stop will feature local and state pro-life leaders and focus on educating voters that their representative

voted for a health care bill that includes taxpayer-funded abortion and betrayed their pro-life constituents.

WHO: **Marilyn Musgrave**, Project Director, Susan B. Anthony List's "Votes Have Consequences"

Bobbi Radeck, Local Pro-life Activist (Cincinnati)

Paula Westwood, Executive Director, Right to Life of Greater Cincinnati (Cincinnati)

Don Bates, Jr., Former Republican U.S. Senate Candidate (Muncie)

Liz Brown, Councilwoman, Fort Wayne City (Fort Wayne and Elkhart)

Karla DiFilippo, Coordinator, 40 Days for Life (Fort Wayne)

Kathy Heuer, Candidate, Indiana House of Representatives, District 83 (Fort Wayne)

Paula Hughes, Allen County Councilwoman, Second District (Fort Wayne)

Cathie Humbarger, Executive Director, Allen County Right to Life (Fort Wayne)

Sharon Kuhn, The Liberty Coalition (Fort Wayne)

Emery McClendon, The Liberty Coalition (Fort Wayne)

Kris Opper, Coordinator, Northeast Indiana Silent No More (Fort Wayne)

Mary Akre, Campaign Director, 40 Days for Life (Elkhart)

Wes Culver, Indiana State Representative, District 49 (Elkhart)

Pastor Ron Johnson, Jr., Executive Director, Indiana Pastors Alliance (Elkhart)

Doug Moore, WFRN Radio (Elkhart)

Peter Recchio, Co-Founder TEA-MAC/Co-Organizer Michiana 9/12 (Elkhart)

WHERE / WHEN:

8:45 AM, Cincinnati, OH Fountain Square, 500 Vine St., Cincinnati, OH 45202

12:15 PM, Muncie, IN Heekin Park, Vietnam Veteran's Memorial, E. Memorial Dr. at S. Monroe St., Muncie IN 47302

2:45 PM, Fort Wayne, IN Courthouse Plaza, 700 S. Clinton St., Fort Wayne, IN 46802

5:30 PM, Elkhart, IN Kardzhall Park, Directly Adjacent to Nibco Park, 303 Nibco Parkway, Elkhart, IN 46516

WHY: Marilyn Musgrave states, "During the health care battle, the abortion issue was a pivot point for the passage or failure of the entire bill. So-called 'pro-life' Democrats chose a last-minute fig leaf over standing up for the pro-life American majority they claimed to represent. We promised then that their vote would have consequences and that we would work hard to inform voters of their betrayal. For not one minute have we let up on that promise and next week we will take this message on the road directly to the voters in a 23-city bus tour. Votes have consequences and, for these pro-life

betrayers, it will be a quick downhill slide to defeat in November."

The Susan B. Anthony List is focusing its efforts In the districts of so-called "pro-life" Democrats Steve Driehaus (OH-01), Marcy Kaptur (OH-09), Brad Ellsworth (IN-Senate), Baron Hill (IN-09), Joe Donnelly (IN-02) and Kathy Dahlkemper (PA-03) as part of its $1.5 million voter education effort, which includes this 23-city "Votes Have Consequences" bus tour. During the health care battle, the SBA List spent over $3 million in the fight to keep taxpayer-funded abortion out of the health care bill. SBA List has committed another $1.5 million to defeat so-called "pro-life" Democrats who voted for the bill. The first two victories of this effort were Rep. Bart Stupak's (MI-01) retirement and Rep. Alan Mollohan's (WV-01) primary election defeat in May.

***The Susan B. Anthony List** is a nationwide network of Americans, over 280,000 residing in all 50 states, dedicated to mobilizing, advancing, and representing pro-life women in politics. Its connected Candidate Fund increases the percentage of pro-life women in the political process.*

For further information, please contact Kerry Brown at 703 470-1926 or kbrown@sba-list.org.

###

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information@sba-List.org

1707 L Street, NW, Suite 750, Washington, DC 20036
(202) 223-8073
privacy policy

EXHIBIT F

POWERED BY YOU AND THE
ENQUIRER COMMUNITY PRESS

POLITICS EXTRA

THE INSIDE SCOOP FROM GREATER CINCINNATI, COLUMBUS & THE NATION'S CAPITAL

Group launching billboard attack on Driehaus

Posted by qtruong September 28th, 2010, 2:39 pm

The **Susan B. Anthony List** is putting up four billboards attacking U.S. Rep **Steve Driehaus** (D-West Price Hill.)

The billboards will go up by Oct. 4 and stay through at least Oct. 31. The locations will be on Interstate 74 near the Colerain Avenue exit, Queen City and Harrison avenues, Reading and William Howard Taft roads, and one somewhere along I-75.

This is the same group that came to Cincinnati in August as part of its "Votes Have Consequences" bus tour. Our previous post on that can be read here.

Some pro-life groups, on the other hand, have been vocal about their support for Driehaus. To read more on that side of the debate, read this previous post.

Tim Mulvey, spokesman for Driehaus' campaign, had this response Tuesday:

> "The Susan B. Anthony List is spreading a lie–again. We've called on the SBA List and their

> allies to point to the single taxpayer dollar used to pay for an abortion. They can't. They have no facts. They're playing politics with abortion to promote a right-wing agenda."

The organization is paying $55,000 for a total of 32 billboards. The others will target other anti-abortion Congressional Democrats in Indiana and Pennsylvania who voted for the health care bill.

This is what the billboard will look like:

EXHIBIT G

WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.

ATTORNEYS & COUNSELLORS AT LAW

1513 FOURTH & VINE TOWER
ONE WEST FOURTH STREET
CINCINNATI, OHIO 45202
TELEPHONE (5 13) 621 • 0267

FAX (513) 381-2375 FAX (513) 621-0262

October 14, 2010

Joseph E. La Rue, Esq. (*via email and regular mail*)
Bopp, Coleson & Bostrom
The National Building
1 South Sixth Street
Terre Haute, Indiana 47807-3510

Re: ***Steve Driehaus v. Susan B. Anthony List***
Ohio Elections Commission Cases 2010-E-084 and 096

Dear Joe:

As promised, we have given thought to the depositions and other discovery we would like to conduct and wanted to apprise you of it as quickly as possible.

First, pursuant to Commission regulations, we ask that you produce the following Susan B. Anthony List employees for depositions (to be followed up with formal notices of depositions):

Marjorie Dannenfelser
Susan B. Anthony List
1707 L Street NW, Suite 750
Washington, DC 20036
Phone: (202) 223-8073

Marilyn Musgrave
Susan B. Anthony List
1707 L Street NW, Suite 750
Washington, DC 20036
Phone: (202) 223-8073

Emily Buchanan
Susan B. Anthony List
1707 L Street NW, Suite 750
Washington, DC 20036
Phone: (202) 223-8073

Because of the Commission's short time window within which we may conduct discovery, we propose conducting these depositions (and those listed below) on October 21, 2010 and October 22, 2010 at the offices of Cohen Milstein, 1100 New York Avenue, NW, Suite 500 West, Washington, D.C., 20005. To accommodate the Commission's expedited schedule, we further propose to double-track these depositions. If you will produce these witnesses on such date, we would in all likelihood include a "duces tecum" attachment with the notice.

Second, given that you proffered their affidavits with your Answer, we request that you assist in arranging the following additional individuals for depositions on the same dates:

Douglas D. Johnson
National Right to Life Committee
512 10th Street, NW
Washington, D.C. 20004
Phone: (202) 626-8800

Thomas McClusky
Family Research Council
801 G Street, NW
Washington, D.C. 20001
Phone: (800) 225-4008

If you are able to arrange these depositions as requested, we in all likelihood would cover the witnesses with subpoenas, again with a "duces tecum" attachment.

Third, because with your Answer you submitted materials generated by the United States Conference of Catholic Bishops, we would like to depose the following individual on one of the above dates:

Jayd Hendricks
United States Conference
of Catholic Bishops
3211 4th Street, NE
Washington, D.C. 20017
Phone: (202) 541-3300

Please let us know if you can facilitate his presence at a deposition.

We are also attaching Complainant's First Request for Production of Documents, also tailored to the anticipated short timeframe.

Finally, per the Ohio Rules, we have a mutual obligation to disclose to one another the witnesses we anticipate calling in our respective cases-in-chief. We understand that it may yet be too early to precisely designate these witnesses, but we propose exchanging witness lists on or before Wednesday, October 20, 2010. Please let us know if you are agreeable to this proposal. Also, please let us know

what depositions you would like to take as soon as you know and we will make every effort to make our witnesses available.

Thanks for your assistance and courtesy, Joe.

Very truly yours,

WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.

/s/ Paul M. De Marco
Paul M. De Marco

/s/ Christopher D. Stock
Christopher D. Stock

OHIO ELECTIONS COMMISSION

STEVE DRIEHAUS	:	
Complainant,	:	
v.	:	**Case Nos. 2010-E-084,**
	:	**2010-E-096**
SUSAN B. ANTHONY	:	
LIST	:	
Respondent.		

COMPLAINANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Ohio Administrative Code § 3517-1-09(A), Complainant Congressman Steve Driehaus ("Complainant") requests that Respondent Susan B. Anthony List ("Respondent") produce all documents set forth in the following Request for Production of Documents. Due to the expedited nature of the proceedings herein, copies of the documents requested shall be produced at the offices of Complainant's attorney on or before 12:00 pm, Tuesday, October 19, 2010. Complainant reserves the right to serve additional or supplemental discovery requests.

DEFINITIONS

1. "Commission" means the Ohio Elections Commission.

2. "Communication" means the transmission of information orally, in writing, electronically, or in some other form and includes correspondence, exchanges of written or record information, face-to-face meetings, and electronic, facsimile or telephone communications.

3. "Document" and "documents" have the broadest sense that Rule 34 of the Ohio Rules of Civil Procedure allows and encompasses any draft, original and all non-identical copies (whether non-identical because of notes made on copies or attached comments, annotations, marks, transmission notations, or highlighting of any kind) of all writings including letters, correspondence, memoranda, legal pleadings, calendars, diaries, travel records, summaries or other records of telephone conversations or interviews, telegrams, notes, reports, compilations, notebooks, work papers, graphs, charts, blueprints, books, pamphlets, brochures, circulars, manuals, instructions, ledgers, drawings, sketches, photographs, films and sound reproductions, sales literature, advertising literature, promotional literature, agreements or minutes of meetings.

4. "Document" and "documents" also include also include any type of electronic data, regardless of media used, format, or device employed to create, store or access the document, which means the original (or identical duplicate when the original is not available), and any non-identical copies (whether non-identical because of notes made on copies or attached comments, annotations, marks, transmission notations, or highlighting of any kind) of mechanical, facsimile, electronic, magnetic, digital, or other programs whether private or commercial, programming notes or instructions, activity listings of electronic mail receipts and/or transmittals, output resulting from the use of any software program, including word processing documents, spreadsheets, database files, charts, graphs, outlines, electronic mail, operating systems, source code of all types, PRF

files, batch files, ASCII files, and any and all miscellaneous media on which they reside, and regardless of whether said electronic data exists in an active file, deleted file or file fragment. Electronic data includes any and all items stored on computer memories, hard disks, floppy disks, CD-ROM, Bernoulli Boxes and their equivalent, magnetic tape of all types, microfiche, punched cards, punched tape, computer chips including, but not limited to EPROM, PROM, RAM and ROM on or in any other vehicle for digital data storage and/or transmittal. The term electronic data also includes the file, folder tabs and/or containers and labels appended to or associated with, any physical storage device associated with each original and/or copy. The term electronic data also includes all Electronic Bulletin Board Services and electronic mail ("E-mail") including all levels of access, sub-boards and conferences and all information contained therein.

5. "Employee" means current and former officers, directors, executives, managers, sales personnel, secretaries, clerical staff, factory workers, messengers, or any other person employed by Respondent.

6. "Identify" or "identity," when referring to a communication, means to state the date of the communication, its type (e.g., letter, telephone call, electronic mail computer message or face-to-face meeting), the identity and role of each participant, its place, the identity of each document constituting or reflecting the communication, and the substance of the communication in detail.

7. "Identify" or "identity," when referring to a document (including drafts), means to state its title,

its date, its author, the persons to whom it was directed (including "cc" and "bcc" recipients), the type of document (e.g., letter, memorandum, chart, etc.), and its principal topics. If any such document is no longer in your possession or subject to your control, state what disposition was made of it, and identify its current location, including the location of each copy, and identify the persons with possession or custody.

8. "Identify" or "identity," when referring to a meeting, means to state the identity of the persons in attendance, the date and place of the meeting, the organizer or sponsor of the meeting and the substance in detail of every responsive communication occurring at or in connection with the meeting.

9. "Identify" or "identity," when referring to a natural person, a corporation or other entity (whether connected with a description of documents or otherwise) means to set forth a name and if a corporation or other entity, its principal place of business or if an individual, the present or last known home address and telephone number, job title and employer, address of employment at the times in question, and the present or last known employer and business address and telephone number. With respect to former employees, officers, directors or agents, please state the last known address.

10. "Identify" or "identity," when referring to an understanding, agreement, pattern, practice or scheme, means to state the identity of the participants and all persons with knowledge; when it was entered into; and its terms; and to identify all documents relating thereto.

11. "Meeting" means any assembly, convocation, encounter, or contemporaneous presence of two or more persons for any purpose, whether planned, arranged, scheduled or not; and whether face-to-face, by telephone, or other means of communication.

12. "Or" is used in its inclusive sense, as an equivalent to "and/or."

13. "PPACA" means the Patient Protection and Affordable Care Act.

14. "Person" means any natural person, corporation, partnership, proprietorship, joint venture, association, governmental entity (including, without limitation, any governmental agency or political subdivision of any government), any group or any other form of public or private business or legal entity.

15. "Relating to," "regarding," or "concerning" means refer to, discuss, describe, reflect, deal with, pertain to, analyze, evaluate, estimate, constitute, study, survey, project, assess, record, summarize, criticize, report, comment, or otherwise involve, in whole or in part.

TIME PERIOD

Except where otherwise indicated, these document requests cover the time period from January 1, 2009 through October 19, 2010, and the term "time period" refers to that span of time. To the extent that a response to a particular document request differs from one part of the time period to another, specify the part of the time period for which each part of the document is applicable.

INSTRUCTIONS

1. These document requests shall be deemed to be continuing in nature so that if defendant, its directors, officers, employees, agents, representatives, or any person acting or purporting to act on behalf of Defendant discover any document previously requested or required to be produced, defendant shall make such document available. Such document shall be served on Complainant's counsel within three days after its discovery. The date the document came into Respondent's possession shall be specified as well as the identity of the person who furnished the document, along with a description of the circumstances and explanation as to why the document was not furnished at the time of the original request.

2. Please produce documents in such fashion as to identify the department, branch or office in whose possession it was located and, where applicable, the natural person in whose possession it was found and the business address of each document's custodian(s).

3. Please produce documents in the same order in which they are kept in the ordinary course of business along with the files, folders, containers or labels associated with such documents.

4. In responding to these requests, please specifically respond to each request, produce documents separately, and designate the Document Request(s) to which each document responds. **The response should indicate the Bates number of the documents that are responsive to the particular Document Request, so that counsel can determine which documents are responsive to each Document Request.**

5. All electronic documents shall be produced in their original electronic form on a CD with all metadata intact.

6. In responding to these requests, you are to include documents (1) obtained from witnesses who gave information to any court, governmental agency or investigatory body; (2) that constitute, refer to or relate to summaries of testimony or other statement in connection with any court, governmental agency of investigatory body proceedings or investigations; or (3) obtained on your behalf by counsel in preparing for testimony or interviews before any court, governmental agency or investigating body.

7. Unless otherwise indicated, the documents to be produced include all documents prepared, sent, dated or received, or those which otherwise came into existence any time during the time period.

8. If you claim any privilege for any document, please provide a detailed privilege log that contains at least the following information for each document that you have withheld:

a. the date of the document and any different date when it was prepared;

b. each author of the document;

c. each person who prepared or participated in the preparation of the document;

d. each person who received the document;

e. each person to whom the document or a copy thereof was sent and each actual recipient of the document or a copy thereof;

f. the present location of the document and all copies thereof;

g. each person having custody or control of the document and all copies thereof;

h. the subject matter of the document;

i. the medium of the document (*e.g.*, paper or electronic), the type of document (*e.g.*, letter, memorandum, presentation), the length of the document, as well as the existence of any attachments, if they are also being withheld under a claim of privilege;

j the specific privilege asserted or other particular reason you rely upon for not producing the document or information; and

k. sufficient further information concerning the document and the circumstances thereof to explain the claim of privilege and to permit the Court to adjudicate the validity of your claim.

9. Notwithstanding the assertion of any objection to production based on a claim of privilege, any document to which an objection is raised containing non-objectionable matter which is relevant and material to a request must be produced, but that portion of the document for which the objection is asserted may be withheld or redacted provided that the above-requested identification is furnished.

10. Each document requested herein is requested to be produced in its entirety and without deletion or excisions, regardless of whether you consider the entire document to be relevant or responsive to these requests. If you have redacted any portion of a document, you should stamp the word "redacted" on

each page of the document which you have redacted. Redactions should be indicated on the Privilege Log.

11. If any document described in this request was, but no longer is, in your possession, or subject to your custody or control, or in existence, state whether:

a. it is missing or lost;

b. it has been destroyed;

c. it has been transferred, voluntarily or involuntarily, to others; or

d. it has been disposed of otherwise.

In each instance, explain the circumstances surrounding such disposition and identify the person(s) directing or authorizing same, and the date(s) thereof. Identify each document by listing its author, his or her address, type (e.g., letter, memorandum, telegrams, chart, photograph, etc.), date, subject matter, present location(s) and custodian(s), and state whether the document (or copies) are still in existence.

12. With respect to any category of documents, the production of which you contend is in some way burdensome or oppressive, state the specific reasons for the objection.

13. If you fail to respond to any document request based on the claim that the document requested has been destroyed or otherwise discarded, identify that document and explain the circumstances which led to the destruction or discarding.

REQUESTS TO PRODUCE

1. Please produce all documents, testimony, affidavits, information or other evidence Respondent will introduce, or otherwise rely on, at the full

Commission hearing to support its claim that the following statement did not violate R.C. §§ 3517.21(B)(9) and (10): "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion."

2. Please produce all documents, testimony, affidavits, information or other evidence Respondent will introduce, or otherwise rely on, at the full Commission hearing to support its claim that the following statement did not violate R.C. §§ 3517.21(B)(9) and (10): Congressman Driehaus "voted for a health care bill that includes taxpayer-funded abortion...."

3. Please produce all documents, testimony, affidavits, information or other evidence Respondent will introduce, or otherwise rely on, at the full Commission hearing to support its claim that the following statement did not violate R.C. §§ 3517.21(B)(9) and (10): "It is a fact that Steve Driehaus has voted for a bill that includes taxpayer funding of abortion."

4. Please produce all documents, testimony, affidavits, information or other evidence Respondent will introduce, or otherwise rely on, at the full Commission hearing to support its claim that the following statement did not violate R.C. §§ 3517.21(B)(9) and (10): Congressman Driehaus "ordered Lamar Companies not to put up billboards until the matter was settled by the Ohio Elections Commission...."

5. Please produce all documents, testimony, memoranda, affidavits, information or other evidence in Respondent's possession, ***regardless of whether*** it will introduce, or otherwise rely on, them at the full Commission hearing that, in any way, relate to

Respondent's claim that the PPACA includes provisions for federal funding of abortions.

6. Please produce all documents, communication (including all letters, e-mails, voice mails, memoranda, notes, and/or other recordings of communication either internally or with any other person or party (other than Respondent's counsel)), testimony, memoranda, affidavits, information or other evidence in Respondent's possession that, in any way, relate to Steve Driehaus, including, but not limited to, his congressional campaign, his voting record, his personal dealings, his party affiliation, his position on health care reform and/or the PPACA, and/or his past public statements.

7. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and the United States Conference of Catholic Bishops or any of its members, directors, employees, officers or other affiliates that relate to health care reform legislation and/or the PPACA.

8. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and the Family Research Council or any of its members, directors, employees, officers or other affiliates that relate to health care reform legislation and/or PPACA.

9. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and the National Right to Life Committee or any of its members, directors, employees, officers or other affiliates that relate to health care reform legislation and/or the PPACA.

10. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and any member of Congress or any of their congressional staff members, campaign staff members or other individuals otherwise affiliated with such members that relate to health care reform legislation and/or the PPACA.

11. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and any employee of the Obama Administration or any other employee, director or other individual otherwise affiliated with the Executive Branch (including any Executive Agency) that relate to health care reform legislation and/or the PPACA.

12. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and the Republican National Committee or any of its members, directors, employees, officers or other affiliates that relate to health care reform legislation and/or the PPACA.

13. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and the Ohio Republican Party or any of its members, directors, employees, officers or other affiliates that relate to health care reform legislation and/or the PPACA.

14. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and the Republican House Campaign Committee or any of its members, directors, employees, officers or other

affiliates that relate to health care reform legislation and/or the PPACA.

15. Please produce all letters, e-mails, voice mails, memoranda, notes, recordings, or other communication between Respondent and FactCheck.org or any of its members, directors, employees, officers or other affiliates that relate to health care reform legislation and/or the PPACA.

16. Please produce all documents, communication (including all letters, e-mails, voice mails, memoranda, notes, and/or other recordings of communication either internally or with any other person or party (other than Respondent's counsel)), testimony, memoranda, affidavits, information or other evidence in Respondent's possession that, in any way, relate to Steve Chabot, including, but not limited to, his congressional campaign, his voting record, his personal dealings, his party affiliation, and/or his past public statements.

Respectfully submitted,

/s Paul M. De Marco
Paul M. De Marco
(0041153)
Christopher D. Stock
(0075443)
WAITE, SCHNEIDER,
BAYLESS & CHESLEY CO.,
L.P.A.
1513 Fourth & Vine
Tower
One West Fourth Street
Cincinnati, Ohio 45202

Telephone: (513) 621-0267
Facsimile: (513) 621-0262

Counsel for Complainant Congressman Steve Driehaus

EXHIBIT

Text of advertisement paid for by
Susan B. Anthony List
Broadcast on 700WLW on October 19, 2010

Congressman Steve Driehaus is threatening my organization with a criminal statute in a desperate attempt to silence us. Steve Driehaus doesn't want you to know the truth. But you deserve to hear it. Steve Driehaus voted for taxpayer funding of abortion when he cast his vote for the health care reform bill. Every major pro life group in the country agrees that the health care reform bill allows for taxpayer funding of abortion including National Right to Life, Americans United for Life, Ohio Right to Life and the United States Conference of Catholic Bishops. We will not be silenced or intimidated. Driehaus voted for taxpayer funding of abortion, and that vote has consequences.

Paid for by the Susan B. Anthony List, which is responsible for the content of this advertisement, not authorized by any candidate or candidate's committee.

EXHIBIT 16

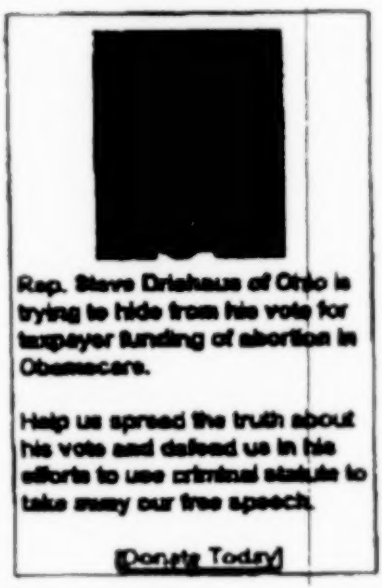
EXHIBIT
17

You won't believe this.

Remember last week when I told you that Congressman Steve Driehaus of Cincinnati, Ohio was attempting to use a criminal statute to silence the SBA List in our effort to inform his constituents that his vote for Obamacare was a vote for taxpayer funded abortion?

A three-member panel of the Ohio Election Commission just voted 2-1 to **allow Rep. Driehaus' claim to proceed**. That means there will be a full-blown hearing of the Ohio Election Commission where they could fine us thousands of dollars and even **send Marjorie to jail for up to six months**.

I know how generous you have already been this year, but please, we need your immediate contribution to help us fight this outrageous infringement of free speech that could even go so far as to result in jail time for Marjorie.



Since we were first betrayed by members of the Rep. Bart Stupak's coalition in March, the SBA List has been working to inform constituents that

their Representative's vote for the health care bill was a vote for taxpayer funding for abortion. Rep. Steve Driehaus was one of those who handed Nancy Pelosi and President Obama the final votes they needed to pass Obamacare and he doesn't like that we were sharing the truth with his constituents, who are pro-life by an overwhelming majority.

We absolutely cannot back down, but we need you to stand with us now. **Please help us defend ourselves and redouble our efforts to share the truth about Rep. Driehaus' vote with his constituents. Please stand with us now by contributing the most you can.**

Rep. Driehaus knows the truth and wants to hide it: Obamacare allows for our tax dollars to fund abortion. Doug Johnson, Legislative Director of the National Right to Life Committee filed a 23-page affidavit on the SBA List's behalf, explaining how the bill allows federal dollars to be spent on abortion. This is a position held by every major pro-life organization in the country and the United States Conference of Catholic Bishops.

A Member of Congress is using a criminal statute in an attempt to intimidate a pro-life organization, and take away our constitutionally-protected right to freedom of speech.

We will not be intimidated and we will stand strong because we know that the truth is on our side.

Steve Driehaus' constituents deserve to know the truth, freedom of speech must remain protected in this country, and most importantly, innocent unborn lives need our protection from this terrible bill.

We need your financial support more than ever as we fight this attack designed to drain us of both our time and resources in the fight to save unborn lives.

Will you stand with the Susan B. Anthony List today and help us stand up to a politician who is trying to silence us?

As I said before, I will continue to keep you updated from now through the hearing. Marjorie and I, and the whole SBA List team appreciate your prayers as we defend the truth and work to save unborn children from the violence of abortion.

For Life,

Emily Buchanan
Executive Director, Susan B. Anthony List
www.sba-list.org

PS: We need your financial support more than ever as we fight this attack designed to drain us of both our time and resources in the fight to save innocent unborn children. ***Will you stand with the Susan B. Anthony List today and help us stand up to a politician who is trying to silence us?***

Contributions or gifts to Susan B. Anthony List, Inc., a 501(c)(4) organization, are not tax-deductible for Federal income tax purposes. Donations may be used for political purposes such as supporting or opposing candidates. All donations are made to the general treasury of the Susan B. Anthony List, Inc., and are not designated for any particular purpose. Donation will be used in the sole discretion of the Officers

and/or Board of Directors in accordance with the mission and purposes of the SBA List.

Remove yourself from this mailing.

OHIO ELECTIONS COMMISSION

Steve Driehaus 3502 Boudinot Avenue Cincinnati, Ohio 45211 *Complainant,* v. **Susan B. Anthony List** 1717 L Street NW, Suite 750 Washington, DC 20036 *Respondent.*	Case No. 2010E-084

Affidavit of the National Right to Life Committee

I, Douglas D. Johnson, being first duly cautioned and sworn, state as follows:

1. I am an adult, over eighteen years of age.

2. I am the Federal Legislative Director for the National Right to Life Committee ("NRLC"), having served in that capacity since 1981. As such, I have personal knowledge of NRLC and its activities, and if called upon to testify I would testify competently as to the matters stated herein.

3. NRLC was incorporated in 1973 in response to two United States Supreme Court decisions, *Roe vs. Wade* and *Doe vs. Bolton*, which invalidated the laws against abortion in all 50 states. NRLC is a federation of affiliated state organizations, including the Ohio Right to Life Society. NRLC seeks to foster government policies and laws that protect the right to

life of all innocent human beings, including unborn children.

4. NRLC maintains a lobbying presence on Capitol Hill and serves as a resource provider for state affiliates, local chapters, individual members, the press, and the public.

5. During much of the current 111th Congress, the primary focus of NRLC's legislative program was to resist enactment of health care legislation that would provide authority for federal subsidies for abortion and/or new authorities for federal regulatory decrees that would expand access to abortion. NRLC also opposed components of the proposed bills that would create mechanisms that will result in government-imposed rationing or denial of lifesaving medical treatments, but the rationing-related components of the legislation are not addressed in this affidavit because they are not relevant to the pending Complaint by Congressman Steve Driehaus.

6. NRLC was supportive of the initial enactment of the "Hyde Amendment" in 1976, and has been instrumental in the annual renewal of that law. The "Hyde Amendment" is a provision, technically known as a "limitation amendment" or "limitation provision," that for years has been added annually to the appropriations bill for the federal Department of Health and Human Services (DHHS). This limitation provision prohibits the use of any funds that flow through that particular appropriations bill (1) to pay directly for abortions, or (2) to subsidize health plans that include coverage of abortions (with exceptions in both prohibitions for abortions to save the life of the mother, or in cases of rape or incest).

7. Starting early in the 111th Congress, in 2009, NRLC advised members of Congress on multiple occasions that under sweeping new health care restructuring legislation, such as was being advanced by Democratic leaders in both houses of Congresses, the Hyde Amendment would not prevent future federal taxpayer funding of abortion, for two reasons, as enumerated in (8) and (9) below.

8. Each version of the health care restructuring legislation that was proposed by senior congressional Democrats and backed by President Obama's White House, including the "Patient Protection and Affordable Health Act" (PPACA) as enacted (Public Law 111-148), contained multiple provisions that created new legal authorities for—or in technical parlance "authorized"—multiple new streams of federal funding, and each version also contained multiple provisions that directly appropriated large sums for new or expanded health programs. These "direct appropriations" were outside the regular funding pipeline of future DHHS appropriations bills and therefore would be entirely untouched by the Hyde Amendment (which controls only funds appropriated through the regular DHHS appropriations bills), even if one assumed that the Hyde Amendment would be renewed for each successive fiscal year in perpetuity.

9. To the extent which the health care legislation would create new or expanded authorities for health programs to which the Hyde Amendment did apply, even in those instances the Hyde Amendment alone would not provide adequate protection against federal funding of abortion, because most of the legal authorities for the programs implicating abortion

policy created by the legislation do not expire, but the Hyde Amendment does expire. The Hyde Amendment is not a permanent law, but a temporary limit on the appropriations provided for a given fiscal year or portion thereof. The Hyde Amendment expires at least once per year, and will lapse on any occasion in which Congress fails to approve and/or the President fails to sign legislation renewing it for another year.

10. Because of the realities described in (8) and (9), NRLC informed members of Congress that any health care restructuring bill that created new health programs and new funding streams must also include a permanent prohibition on the use of those programs and funds for elective abortion, and that the failure to include such protective language in the new law predictably would ultimately result in large-scale federal funding of abortion.

11. The version of the health care bill (H.R. 3962) that reached the floor of the U.S. House of Representatives on November 7, 2009, was 2,014 pages long. It contained multiple provisions that would have authorized federal subsidies for abortion, including but not limited to a section that explicitly authorized a new federal program operated directly by the federal government (the "public option") to pay for any type of elective abortion.

12. Because H.R. 3962 was riddled with deficient abortion-related provisions, on the House floor, a comprehensive remedial amendment was offered by Reps. Bart Stupak (D-Mi.) and Joseph Pitts (R-Pa.). The Stupak-Pitts Amendment (Exhibit D) was supported by NRLC and numerous other pro-life organizations. The Stupak-Pitts Amendment did two

things: (1) It surgically removed provisions of the bill that directly authorized abortion funding, except when necessary to prevent the death of the mother or in cases of rape or incest; and (2) it imposed a blanket prohibition on any provision in the bill being interpreted or employed to allow abortion subsidies. The prohibition contained in the Stupak-Pitts Amendment was bill-wide and permanent (i.e., not contingent on any requirement for perpetual annual renewal). The amendment stated in part, "No funds authorized or appropriated by this Act (or an amendment made by this Act) may be used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion, except in the case where a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself, or unless the pregnancy is the result of an act of rape or incest."

13. The Stupak-Pitts Amendment was adopted by a bipartisan vote of 240-194 (House Roll Call No. 884), after which the House approved H.R. 3962 and sent it to the Senate.

14. The Complainant, Congressman Steve Driehaus, voted for the Stupak-Pitts Amendment, and he voted to pass H.R. 3962 as amended. Because of the adoption of the Stupak-Pitts Amendment, H.R. 3962 as passed by the House did not include "taxpayer funding of abortion," except in very narrow circumstances, and therefore a vote in favor of

passing H.R. 3962-as-amended was not a vote in favor of "taxpayer funding of abortion."

15. However, H.R. 3962 was *not* the bill that was ultimately enacted into law. The bill that was ultimately enacted—with the support of Congressman Driehaus—had many abortion-related elements in common with the version of H.R. 3962 that existed *before* the adoption of the Stupak-Pitts Amendment. The bill as enacted lacked any protective language remotely comparable to the Stupak-Pitts Amendment. It is Mr. Driehaus's vote for the bill that was actually enacted, the PPACA (now Public Law 111-148), that is accurately characterized as a vote for "taxpayer-funded abortion," because the enacted bill contained multiple provisions that do in fact authorize (i.e., create legal authority for) taxpayer funding of abortion, and that predictably will result in such funding in the future – unless the law itself is repealed, or unless the law is revised by a future Congress to include statutory language along the lines of the Stupak-Pitts Amendment.

16. Following adoption by the House of the Stupak-Pitts Amendment on November 7, 2009, many influential persons and organizations on the pro-abortion side of the debate expressed strong dismay at the House's action in approving the amendment, and expressed their determination that no such abortion-neutralizing language should win approval in the U.S. Senate. Among the public critics of the House's adoption of the Stupak-Pitts Amendment were President Barack Obama and House Speaker Nancy Pelosi (D-Ca.).

17. In this environment, a new version of the health care legislation was written, behind closed doors, by Senate Majority Leader Harry Reid (D-Nv.), and released to the public on November 18 2009, with the new title of "The Patient Protection and Affordable Care Act" (hereafter, "PPACA"). This rewritten bill did not contain the House-approved Stupak-Pitts language. Rather, the abortion-related provisions that it contained were parallel, in many respects, to most objectionable abortion-related provisions of the original House bill, prior to the November 7, 2009 adoption of the corrective Stupak-Pitts Amendment.

18. On the Senate floor, Senators Ben Nelson (D-Ne.) and Orrin Hatch (R-Utah) offered an amendment (Senate Amendment No. 2962, Exhibit E) that was very similar to the Stupak-Pitts Amendment, in that it would have prevented any component of the bill from being used to subsidize abortions or insurance plans that cover abortion (except to save the life of the mother, or in cases of rape or incest). The amendment stated in part, "No funds authorized or appropriated by this Act (or an amendment made by this Act) may be used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion, except in the case where a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself, or unless the pregnancy is the result of an act of rape or incest."

19. NRLC supported the Nelson-Hatch Amendment, but the amendment was tabled (killed) on a vote of 54-45 on December 8, 2009, and therefore did not become part of the enacted law as ultimately enacted.

20. Weeks later, the Senate considered a final package of revisions to the pending bill, known as a "manager's amendment." The manager's amendment left most of the abortion-related components of the bill unchanged, but inserted new language (sometimes referred to as the "Nelson-Boxer language") into the section creating a program to subsidize the purchase of health insurance by persons who meet certain eligibility requirements. (The new language is found in Section 10104 of the enacted bill, in Section 1303 as amended.) In a letter to members of the Senate dated December 20, 2009 (Exhibit F), NRLC characterized the new (and final) abortion-related language contained in the "manager's amendment," as follows: "Regarding abortion policy, the language of the manager's amendment is light years removed from the Stupak-Pitts Amendment that was approved by the House of Representatives on November 7 by a bipartisan vote of 240-194. The new abortion language solves none of the fundamental abortion-related problems with the underlying Senate bill, and it actually creates some new abortion-related problems. We view a vote for cloture on the amendment as a vote to advance legislation to allow the federal government to subsidize private insurance plans that cover abortion on demand, to oversee multi-state plans that cover elective abortions, and to empower federal officials to mandate that private health plans cover abortions even if they do not accept subsidized enrollees. . . .

The abortion-related language violates the principles of the Hyde Amendment by requiring the federal government to pay premiums for private health plans that will cover any or all abortions."

21. Notwithstanding such objections from NRLC and other pro-life organizations, the Senate adopted the "manager's amendment" on December 21, 2009.

22. In a letter to members of the U.S. Senate dated December 22, 2009 (Exhibit G), NRLC expressed its strong objections to multiple provisions of the final bill. Among other objections, the NRLC letter said that the Senate language "violates the principles of the Hyde Amendment by requiring the federal government to pay premiums for private health plans that will cover any or all abortions."

23. Notwithstanding objections from NRLC and other pro-life organizations, the Senate passed the PPACA on December 24, 2009, under the bill number H.R. 3590, and sent it to the House of Representatives.

24. Subsequently, at the urging of the White House, House Speaker Nancy Pelosi indicated her intention to force an up-or-down vote on the Senate-passed H.R. 3590, without allowing further amendments to be offered to it.

25. In a three-page single-spaced letter to U.S. House members dated March 19, 2010 (Exhibit H), NRLC again detailed the multiple abortion-expanding components of the pending Senate-passed bill, stating in part: "The bill is riddled with provisions that predictably will result in federal subsidies for private insurance plans that cover abortion (some of which will be administered directly by the federal government), direct federal funding of

abortion through Community Health Centers, and pro-abortion federal administrative mandates. The sum of these provisions makes H.R. 3590 the most abortion-expansive piece of legislation ever to reach the floor of the House of Representatives. . . . [T]he purported protections in the Senate bill are all very narrow, riddled with loopholes, and/or rigged to expire. There is nothing in the Senate bill remotely resembling the Stupak-Pitts Amendment, added to H.R. 3962 by the House of Representatives on November 7, 2009, which was an effective, bill-wide, permanent prohibition on subsidies for abortion under the programs authorized by the bill."

26. Similar assessments of the Senate language were issued by other knowledgeable analysts, including "Legal Analysis of the Provisions of The Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection," issued by the Office of General Counsel of the U.S. Conference of Catholic Bishops (USCCB) on March 25, 2010 (Exhibit I).

27. Notwithstanding NRLC's objections, on March 21, 2010, the House of Representatives passed the PPACA (H.R. 3590), without making revisions to any of the abortion-expanding provisions discussed in NRLC's letter of March 19. Congressman Driehaus voted for the bill, exactly as it had been received from the Senate, and thereby voted to send it directly to President Obama for his signature without further revision (House Roll Call No. 165).

28. The PPACA was signed into law by President Obama on March 23, 2010, and is now designated as Public Law 111-148.

29. No subsequent enactment by Congress has modified any of the provisions of the PPACA that implicate abortion policy as listed in the March 19, 2010 NRLC letter, nor have any of the provisions discussed in the paragraphs below been altered by any subsequent enactments.

30. In his Complaint and affidavit submitted to the Commission, Mr. Driehaus relies heavily on certain claims regarding the content of Executive Order 13535 ((75 Fed. Reg. 15599 (2010)), which was signed by President Obama on March 24, 2010. However, a federal executive order is a unitary act by a president of the United States, which is not voted on by members of Congress. What Congressman Driehaus "voted for" are the provisions contained in H.R. 3590 (the PPACA) on March 21, 2010, in House Roll Call No. 165. There may be any number of administrative regulations, executive orders, and/or court decisions interpreting the multitudinous provisions of the PPACA, but what Congressman Driehaus "voted for" were the provisions of H.R. 3590.

31. The Complaint asserts (on page 2), "Both the PPACA and Executive Order 13535 contain provisions ensuring that there will be no taxpayer-funded abortions as a result of the passage of the PPACA." However, the actual abortion-related language found in the PPACA falls very far short of supporting that assertion, and the language of the Executive Order, if it deemed pertinent at all, also falls very far short of supporting that assertion. Executive Order 13535, in its operative sections, addresses only two of the abortion-related components of the bill. Regarding the premium-

subsidy program, Section 2 of the Executive Order does little more than reiterate the statutory language, under which federal tax-based subsidies will help pay for health plans that cover elective abortions, as explained in other paragraphs in this affidavit. In Section 3, involving Community Health Centers, the Executive Order purports to prohibit the use of funds appropriated under one narrow section of the Act for abortions—but the enforceability of this component of the order has been disputed, since it lacks a foundation in the language of the statute itself.

32. The PPACA, as enacted, was 906 pages long. It contained multiple provisions that authorize new programs or expand authorizations for existing programs that are authorized to cover abortion, either explicitly or implicitly. Some of these provisions are entirely untouched by any limitation on abortion in existing law or in the PCACA itself, and others are subject only to limitations that are temporary or contingent. Statutes authorizing or requiring government funding for health services, broadly defined, consistently are construed by courts to encompass abortion services except when Congress excludes abortion in explicit language. But the legislation as enacted contained no bill-wide abortion restriction comparable to the Stupak-Pitts Amendment that had been part of the House-passed bill. Thus, any House member who voted for the PPACA did indeed vote to authorize "taxpayer funding of abortion," not just in one component of the law, but under multiple programs and authorities created by the law.

33. What I describe is what the law that Congressman Driehaus voted for actually authorizes, even though most of the provisions have not yet been implemented, and some will not be implemented until 2014.

34. However, one pertinent component of the PPACA has already been implemented, which is Section 1101 (42 U.S.C. § 18001) creating the Pre-Existing Condition Insurance Plan (PCIP), also known as the "high-risk pool" program. This program is completely federally funded and may cover up to 400,000 people when fully implemented. The PPACA directly authorizes $5 billion in federal funds ("taxpayer funds") for this program alone. As NRLC noted in its letter to the House of Representatives dated March 19, 2010 (Exhibit H, on page 2, paragraph 2), the bill contained no restriction on the use of these funds for abortion.

35. Since Section 1101 mandated launching the PCIP program within 90 days of enactment of the law, the federal Department of Health and Human Services invited states that wished to operate the program in their respective states to submit proposals by June 1, 2010, and many states did submit proposals by that date or soon thereafter. During July, 2010, I and other NRLC staff persons examined the state-submitted proposals that were made available to the public. Most of the submitted state plans were not made available, but of those we were able to obtain, we found that three states had submitted and apparently received DHHS approval for plans that covered elective abortion (Pennsylvania, New Mexico, and Maryland).

36. Beginning on July 13, 2010, NRLC issued a series of statements to news media, objecting to the DHHS actions in approving state-submitted PCIP plans that covered elective abortion. (The initial NRLC release on the matter, focusing on the DHHS-approved PCIP plan for Pennsylvania, is Exhibit J.)

37. In a report published on July 22, 2010 report, www.FactCheck.org, a nonpartisan entity operated by the Annenberg Public Policy Center, examined NRLC's July 13 press release regarding the DHHS-approved PCIP proposal for Pennsylvania and concluded that NRLC was correct in asserting that it covered abortion. The FactCheck.org report is posted here: http://www.factcheck.org/2010/07/taxpayer-funded-abortions-in-high-risk-pools/ (Exhibit K).

38. The State of New Mexico explicitly listed "elective termination of pregnancy" as covered under the federal PCIP in that state, in a document provided on a state website to prospective enrollees (Exhibit L), as officials at the New Mexico agency confirmed to the Associated Press (Exhibit M).

39. On July 23, 2010, the Congressional Research Service (CRS), a nonpartisan research support agency for Congress, issued a report (Exhibit N) confirming that neither the Hyde Amendment nor any provision of the PPACA prevented the use of funds in the PCIP program from being used to cover all elective abortions. The CRS report also correctly noted that Executive Order 13535 was entirely silent on the PCIP component of the PPACA. The CRS report also correctly noted that the PPACA gives the Secretary of HHS authority to impose "any other requirements determined appropriate by the

Secretary" specifically with respect to the high-risk pool program. The CRS report is posted on the internet at http://www.nrlc.org/AHC/CRSReport AbortionandHighRiskPools.pdf

40. In a press release dated July 14, 2010 (Exhibit O), DHHS spokeswoman Jenny Backus announced that "abortions will not be covered in the Pre-existing Condition Insurance Plan (PCIP) except in the cases of rape or incest, or where the life of the woman would be endangered." The statement did not suggest that anything in the PPACA or the Executive Order prohibited the use of the PCIP funds for abortion, and clearly implied otherwise.

41. On July 29, 2010, the federal Department of Health and Human Services issued a regulation specifying that it will not allow coverage of abortions under the PCIP in any state, except to save the life of the mother, or in cases of rape or incest. ((75 Fed. Reg. 45014 (2010)) (Exhibit P). DHHS did not assert that this decision was legally dictated by any provision of the PPACA or by Executive Order 13535, but implicitly recognized that this was not the case, merely observing that similar restrictions were in force in "certain federal programs that are similar to the PCIP program."

42. On the same day the regulation was issued—July 29, 2010—the head of the White House Office of Health Reform, Nancy-Ann DeParle, issued a statement on the White House blog explaining that the discretionary decision to exclude abortion from the PCIP "is not a precedent for other programs or policies [under the PPACA] given the unique, temporary nature of the program . . ." (Exhibit Q)

43. Many commentators for pro-abortion groups publicly criticized the DHHS action in excluding abortion coverage from the PCIP program, and pointed out nothing in the PPACA or the Executive Order restricted the use of PCIP funds for abortion. For example, Laura Murphy, director of the Washington Legislative Office of the American Civil Liberties Union, said, "The White House has decided to voluntarily impose the ban for all women in the newly-created high risk insurance pools. . . . What is disappointing is that there is nothing in the law that requires the Obama Administration to impose this broad and highly restrictive abortion ban." ("ACLU steps into healthcare reform fray over abortion," *The Hill*, July 17, 2010.)

44. The entire series of events surrounding the implementation of the PCIP provides an early and graphic demonstration that the statutory language of the PPACA does authorize taxpayer funding of abortion; and that such funding is not precluded by the Hyde Amendment or any other existing law, or by any provision of the PPACA or of Executive Order 13535. The section of the PPACA creating the PCIP authorized coverage of general health services and did not exclude abortion; various states submitted plans that explicitly included elective abortion and were approved by DHHS; and the Administration *did not even claim* that its ultimate decision to exclude elective abortion from the PCIP was compelled by either by language in the law or by language in Executive Order 13535 (since no such language exists in either document). In response to political imperatives, DHHS ultimately drew on the discretionary administrative authority that the bill conferred specifically with respect to the PCIP

program to shut off abortion funding in the PCIP—even as the senior White House health policy aide underscored that this would not be a precedent for implementation of other components of the PPACA.

45. NRLC and other organizations provided detailed analyses and advisories to the members of the House of Representatives, prior to the March 21, 2010 roll call by which H.R. 3590 was approved, warning that the bill contained multiple provisions that could be used to fund elective abortion. NRLC explicitly listed Section 1101 (creating the PCIP program) among the examples of such provisions. The assertions by the Susan B. Anthony List, "Driehaus voted FOR taxpayer-funded abortion" and "voted for a health care bill that includes taxpayer-funded abortion" are truthful and are validated by the example of the PCIP program—as confirmed by the Congressional Research Service and other analysts, such authority exists with respect to the $5 billion PCIP program.

46. While the abortion-funding authority created by the PPACA for the PCIP alone would suffice to demonstrate the truthfulness of the assertions by the Susan B. Anthony List, there are multiple additional provisions of the law which also provide abortion-funding authorities.

47. The PPACA, Section 1401 (26 U.S.C. § 36B) establishes a new program under which federal tax-based subsidies will be used to assist tens of millions of Americans in purchasing health insurance. Under the House-passed bill, in order to qualify for such a federal subsidy, a private health plan would have been required not to cover abortions (except to save the life of the mother, or in cases of rape or incest).

(H.R. 3962, Engrossed in House of Representatives, § 265.) Congress has long imposed just such a requirement with respect to the Federal Employees Health Benefits program (Public Law 111-117, Consolidated Appropriations Act, 2010, Division C, Title VI, General Provisions, 123 Stat. 3034, 3203) and the Medicaid program (Public Law 111-117, Consolidated Appropriations Act, 2010, Division D, Title V, General Provisions, 123 Stat. 3034, 3280). However, the PPACA contains no such prohibition. Rather, it contains language (in Section 1303 as amended, found in 42 U.S.C. § 18023) that allows federal funds to subsidize private plans that cover all abortions. The language says that federal funds may be used to pay for any abortions that could be funded, in any future fiscal year, under the annual appropriations bill that funds the Department of Health and Human Services. This means that if Congress ever fails to renew the Hyde Amendment, which is a provision of the annual DHHS appropriations bill that expires annually, and thereby permits federal funding of abortion on demand under Medicaid, then the PPACA explicitly authorizes the new premium subsidy program to also pay for abortion on demand with federal funds. This language is in stark contrast with the NRLC-backed Stupak-Pitts and Nelson-Hatch amendments, which, if either amendment had been enacted, would have explicitly prohibited any funds authorized under any part of the massive health care law from funding elective abortion, regardless of what policy Congress and the President set for Medicaid in any future fiscal year through the DHHS appropriations bill.

48. With respect to the premium subsidy program created by the PPACA, Executive Order 13535

merely reiterates the provisions of the bill as outlined above. Under the Executive Order, federal funds will subsidize the purchase of private plans that cover elective abortion as soon as the program is implemented, and also require the carriers to collect from each enrollee an additional payment to cover abortions. The Complaint insists that this two-payment scheme does not amount to federal funding of abortion, but as we see it, when the federal government pays premiums for an insurance plan, it subsidizes what that insurance plan covers, notwithstanding any cosmetic bookkeeping requirements.

49. NRLC's analysis is consistent with that found in "Legal Analysis of the Provisions of The Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection," issued by the Office of General Counsel of the U.S. Conference of Catholic Bishops (USCCB) on March 25, 2010 (Exhibit I), which notes: "[U]nder Section 1303, the tax credits are still used to pay overall premiums for health plans covering elective abortions. This violates the principle reflected in the second part of the Hyde Amendment, which forbids use of federal funds for any part of a health benefits package that covers elective abortions. Omnibus Appropriations Act, 2010, Div. D, tit. V, § 507(b)."

50. Moreover, nothing in the PPACA or in the Executive Order will in any way prevent private insurance carriers from using the federal tax-based subsidies *directly* to pay for coverage of *all elective abortions* on any future date in which Medicaid reimbursement for abortion is permitted because of

failure to renew the Hyde Amendment. Indeed, such direct use of the federal funds to pay for unrestricted abortion coverage is explicitly authorized in the PPACA, and is made effective six months following the date that the Hyde Amendment lapses. The pertinent provision of the PPACA is found in Section 10104, which creates an amended Section 1303(b)(1)(B)(ii) (42 U.S.C. § 18023), which reads, "(ii) ABORTIONS FOR WHICH PUBLIC FUNDING IS ALLOWED. — The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved."

51. In voting for the bill containing Section 10104 and the amended Section 1303(b)(1)(B)(ii) contained therein, Mr. Driehaus voted to authorize taxpayer funding of elective abortion without restriction, under a future contingency.

52. Mr. Driehaus's vote in favor of the bill with the language authorizing private insurance carriers to use federal funds directly to pay for abortion on demand, in the premium-subsidy program, when a future contingency is met (i.e., non-renewal of the Hyde Amendment, even though the Hyde Amendment only applies directly to Medicaid and other programs unrelated to the premium-subsidy program), alone would demonstrate the validity of the disputed assertions by the Susan B. Anthony List that Mr. Driehaus "voted FOR taxpayer-funded abortion." But again, there is more.

53. The PPACA, Section 10503 (42 U.S.C. § 254b-2), directly appropriated $7 billion in new federal

funding for Federally Qualified Community Health Centers (hereafter, "CHCs"). At least two pro-abortion advocacy organizations, the Reproductive Health Access Project and the Abortion Access Project, have active projects underway to persuade CHCs to provide abortions induced by the drug RU486. The $7 billion provided for CHCs are not touched by any restriction on their use for abortion in the bill itself or in existing law. NRLC highlighted this concern in a memorandum sent to members of the U.S. House of Representatives on February 12, 2010, updated on March 18, 2010 (Exhibit R).

54. Analysts at the U.S. Conference of Catholic Bishops (USCCB) concluded that the bill language, coupled with existing federal laws governing subsidies to CHCs, would be interpreted by courts to not only authorize (allow) but also mandate provision of abortion services by federally funded CHCs. (See "Legal Analysis," Exhibit I.)

55. In support of its analysis, the USCCB circulated a letter from Robert A. Destro, professor of law at The Catholic University of America, dated March 20, 2010 (Exhibit S). Prof. Destro notes in the letter that he has been personally involved in abortion-funding litigation since 1977.

56. The Complaint asserts (on pages 1-2) that Executive Order 13535 was "intended 'to establish a comprehensive, Government-wide set of policies and procedures. . . to make certain that all relevant actors—Federal officials, State officials (including insurance regulators) and health care providers—are aware of their responsibilities' under the PPACA." The quoted language is taken from Section 1 of the Executive Order. But the language of Section 1 is

purely discursive and rhetorical; it contains no binding directives from the chief executive to his subordinates whatsoever. The two operative sections of the Executive Order (Sections 2 and 3) are very narrowly focused and do not establish any bill-wide barrier to federal funding of abortion—much less establish any "government-wide" barrier to federal funding of abortion.

57. The fourth and final section of the Order merely reiterates that the Order must be construed consistently with applicable laws and does not affect pre-existing agency authorities – which underscores why it is the language of the law that is pertinent here.

58. The Complaint asserts (on page 4) that the Order "actually prohibits the government, its agencies, and all relevant actors from using federal funds provided for under the law to pay for abortions." In addition, the Complaint asserts (on page 1) that the Order "has the force of law governing federal expenditures under the PPACA." These assertions are so overstated as to be highly misleading. There are no directives in the Order that apply to all, or even to most, of the provisions of the PPACA. The operative provisions that are actually contained in the Order are extremely narrow and highly qualified, as discussed in other paragraphs of this affidavit.

59. The Complaint quotes a statement, also found in Section 1 of the Executive Order, that the PPACA "maintains" current Hyde Amendment restrictions. This is typical of the rhetorical and non-substantive character of Section 1 of the Order. The Hyde Amendment is a provision that applies only to funds

appropriated through the annual DHHS appropriations bill, with the pertinence to abortion policy being primarily the question of whether the federal Medicaid program (which is funded primarily through that bill) will pay for elective abortions during any given fiscal year. The PPACA contained multiple new authorities and direct appropriations that are entirely untouched by the Hyde Amendment, and therefore the Order's reference to "maintaining" the Hyde Amendment is no more than an artfully worded exercise in misdirection.

60. In my professional opinion, Executive Order 13535 has the hallmarks of a primarily political document. It has the appearance of having been very carefully crafted to provide as much as possible in the way of political "optics," by which I mean rhetorical political "cover" for certain members of Congress, including but not limited to Congressman Driehaus, while at the same time containing as little as possible in "force of law" provisions that would offend the pro-abortion advocacy groups with which President Obama has long been allied.

61. Consistent with my professional opinion as expressed in paragraph (60) were the assessments of the Order made by some prominent advocates on the pro-abortion side of the debate. For example, Cecile Richards, the president of the Planned Parenthood Federation of America (PPFA), the nation's largest abortion provider, said that the Order amounted to "a symbolic gesture" (*USA Today*, March 25, 2010)

62. Regarding the Order, the careful analysis by the Office of General Counsel of the U.S. Conference of Catholic Bishops (Exhibit I), dated March 25, 2010, observed, "Apparently cognizant of the constitutional

prohibition on the Executive Branch's exercising legislative power, the Executive Order does not describe itself as creating any new restrictions with regard to abortion. Instead, the Order only purports to describe what the Act already provides, and to enforce those existing provisions. The main problem is that two of the operative provisions of the Order misdescribe what PPACA actually does. Correspondingly, the enforcement of those provisions in accordance with the Order's misdescription is highly likely to be held invalid as exceeding the President's authority, if challenged in court. Two other provisions of the Order do accurately describe features of PPACA. . . But they suffer from a different problem instead—though legally valid, those provisions fail to meet the standard of the Hyde Amendment regarding the ban on funding plans that cover abortion, mirroring the failure of the statute itself in this regard. Thus, none of the provisions of the Order represent valid fixes to those shortcomings of PPACA."

63. Section 10104 of the PPACA enacted revised language in Section 1334 (42 U.S.C. § 18054) which establishes "multi-state" plans that will be administered by the federal Office of Personnel Management (OPM). The bill provides that "at least one" of the multi-state plans are subject to a restriction on abortion coverage, contingent on continuation of the Hyde Amendment, but this clearly authorizes OPM to mandate abortion coverage in any number of additional multi-state plans. In this case, the abortion-covering plans will be both administered by a federal agency (which operates on taxpayer funds) and subsidized by the tax-based premium-subsidy program.

64. The four examples given in paragraphs numbered 34 through 63 above—involving authorization for abortion coverage under the Pre-existing Condition Insurance Plan (paragraphs 34-46), federal subsidies for private health plans that cover elective abortions (paragraphs 47-52), authorization for abortion funding through Community Health Centers (paragraphs 53-55), and authorization for inclusion of abortion coverage in health plans administered by the federal Office of Personnel Management (paragraph 63—are provided for illustration. Any of the four examples given, taken alone, would provide ample basis to validate the truthfulness of the assertion made by the Susan B. Anthony List that Congressman Driehaus "voted for taxpayer-funded abortion." But these examples do not represent an exhaustive list of all the provisions of the PPACA that may provide federal subsidies for abortion. Because of the absence of any bill-wide restriction on federal funding of abortion, and because even the narrow restrictions contained in the bill are temporary, there are other provisions that also may be employed in the future to provide federal funds for abortion, including those dealing with Indian health programs and health co-ops.

65. All of these authorizations for future federal funding of abortion would have been closed by enactment of the Stupak-Pitts or Nelson-Hatch amendments – but by voting to enact the bill without such an amendment, Mr. Driehaus did, in objective truth, vote to create legal authorization for taxpayer funding of abortion, through multiple funding pipelines and programs.

I declare under the penalty of perjury under all applicable law that the foregoing is true and correct, to the best of my belief and knowledge. Executed this 11th day of October, 2010, in Prince George's County, Maryland.

/s/ Douglas D. Johnson
Douglas D. Johnson,
Federal Legislative Director
National Right to Life Committee

Signed and sworn before a Notary Public this 11th day of October, 2010, in Prince George's County, Maryland.

/s/ Carolyn A. Johnson
Notary Public

My Commission Expires December 8, 2013

[SEAL]

No. 10-4320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN B. ANTHONY LIST, Plaintiff- Appellant, v. Rep. STEVEN DRIEHAUS; JOHN MROCZKOWSKI; BRYAN FELMET; JAYME SMOOT; HARVEY SHAPIRO; DEGEE WILHELM; LARRY WOLPERT; PHILIP RICHTER; CHARLES CALVERT, Defendants - Appellees.	ORDER FILED Oct 28, 2010 LEONARD GREEN, Clerk

Before: GIBBONS and WHITE, Circuit Judges; MALONEY, District Judge*

Plaintiff Susan B. Anthony List ("SBA List") states that it is "a non-stock, non-profit, corporation organized pursuant to Internal Revenue Code Section 501(c)(4)" and that it is "designed to advance pro-life causes." Defendant Representative Steven Driehaus

* The Honorable Paul L. Maloney, United States District Judge for the Western District of Michigan, sitting by designation.

is an Ohio congressman running for reelection. Rep. Driehaus filed two complaints with the Ohio Elections Commission ("Commission") that allege the SBA List violated Ohio Rev. Code §§ 3517.21(B)(9) and (10) by making false statements concerning his voting record in political publications and advertisements. At a preliminary hearing, the Commission determined that there was probable cause that SBA List had violated the statute and set the matter for a final hearing. Subsequently, on the joint request of the SBA List and Rep. Driehaus, that hearing was continued.

After Rep. Driehaus filed his complaint with the Commission, SBA List filed the instant action in the federal district court for the Southern District of Ohio. It named as defendants Rep. Driehaus, the members of the Commission, and its Executive Director and Staff Attorney. SBA List asserts that §§ 3517.21(B)(9) and (10) are unconstitutional facially and as applied and violate its rights under the First and Fourteenth Amendments of the United States Constitution. It moved the district court for a temporary restraining order and a preliminary injunction to enjoin the Commission from continuing its proceedings pending the district court's final decision on its complaint.

The district court issued an order denying the motion for a temporary restraining order and staying the case. The court concluded that the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and succeeding cases, applied. It thus "decline[d] to interfere with on-going state proceedings" and noted that the "Commission and the state courts of Ohio are fully capable of construing

Ohio's statutory mandates in light of Ohio and federal constitutional principles." The district court further stayed the case "pending resolution of the underlying proceedings in the Ohio Elections Commission and any and all appeals through the court of Ohio and the Supreme Court of the United States."

SBA List appeals that order and moves for an emergency injunction pending appeal. The Commission members and its Director respond in opposition. Rep. Driehaus also responds in opposition. All defendants challenge this court's jurisdiction and oppose the request for injunctive relief on the merits.

Interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions" are within the appellate jurisdiction of this court. 28 U.S.C. § 1292(a)(1). Generally, the denial of a temporary restraining order is not an appealable order. *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., AFL-CIO*, 473 U.S. 1301, 1303-04 (1985) (Burger, C.J.) (denying stay). But "the label attached to an order by the trial court is not decisive, and the court looks to the nature of the order and the substance of the proceeding below to determine whether the rationale for denying appeal applies." *Ne. Ohio Coal. for the Homeless and Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006). Interlocutory appeal has been permitted when a temporary restraining order "threatened to inflict irretrievable harms" before it expired. *Id.* at 1005-06. Conversely, SBA List asserts that the district court's denial of immediate relief essentially denies the preliminary injunctive

relief that it sought because the district court also has stayed the action until after the Commission's completion of its proceedings and any further appeals—a period that clearly extends beyond the November 2, 2010 election. After the election, SBA List's need for immediate relief dissipates. To this limited extent, the district court's order constitutes the denial of preliminary injunctive relief and thus is appealable.

Further, it is within our discretion to issue an injunction pending appeal. *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Id.* The relevant factors are: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573; *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). Upon our review, we cannot conclude that SBA List has shown grounds for issuance of an injunction pending appeal.

The district court declined to enter injunctive relief because it concluded that the three factors for *Younger* abstention had been met: (1) the proceedings before the Commission are "judicial in nature;" (2) the "oversight of state and local elections is clearly an important state interest;" and (3) SBA List has "an adequate opportunity to raise constitutional

challenges during Commission proceedings." SBA List, however, argues that it has demonstrated circumstances that make abstention under *Younger* inappropriate and therefore that the district court should have considered and granted its request for an injunction.

In this regard, we do not find the necessary likelihood of success on the merits. Exceptions to *Younger* abstention may include "bad faith, harassment, or flagrant unconstitutionality." *Fieger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996). None of these appear to be present in this case. Nor do we believe that SBA List faces irreparable harm in the absence of an injunction. SBA List argues that its pre-election speech has been chilled. This is an insufficient basis to overcome *Younger* abstention. *Younger*, 401 U.S. at 51. Further, SBA List clearly has not been enjoined from any speech, and all indications are that its speech continues to be robust. In short, we do not believe there to be such extraordinary circumstances that would support the entry of an injunction pending appeal.

Therefore, the motion for an injunction pending appeal is **DENIED**.

ENTERED BY ORDER
OF THE COURT

Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SUSAN B. ANTHONY LIST, *et al.*,	Case No. 1:10-cv-720
Plaintiffs,	
vs.	Judge Timothy S. Black
STEVE DRIEHAUS, *et al.*,	
Defendants.	**ORDER LIFTING STAY**

On October 25, 2010, this Court stayed the above captioned case pending resolution of the underlying proceedings in the Ohio Elections Commission ("OEC"). On November 12, 2010, Defendant Driehaus filed an unopposed request with the OEC to withdraw his complaint in that proceeding. On December 2, 2010, the OEC granted Defendant's request, thereby terminating the OEC proceeding. (Doc. 18, Ex. B). Accordingly, this Court **LIFTS** the stay that it imposed in its October 25, 2010 Order (Doc. 14), and **REOPENS** the case for resolution.

IT IS SO ORDERED.

Date: 12/6/10

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

United States District Court
for the Southern District of Ohio
Western Division

SUSAN B. ANTHONY LIST, *Plaintiff,* *v.* Rep. STEVE DRIEHAUS; JOHN MROCZKOWSKI, BRYAN FELMET, CHARLES CALVERT, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, and LARRY WOLPERT, Ohio Elections Commission Members, in their official capacities; PHILIP RICHTER, Staff Attorney for the Ohio Elections Commission, in his official capacity; and JENNIFER BRUNNER, Ohio Secretary of State, in her official capacity, *Defendants.*	Cause No. 1:10-CV-720-TSB

Amended Verified Complaint for Declaratory and Injunctive Relief

Plaintiff Susan B. Anthony List complains and alleges as follows:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. It concerns the constitutionality of Ohio Revised Code ("R.C.") Sections 3517.21(B)(9) and (10) and 3517.20.

2. Plaintiff complains that Sections 3517.21(B)(9) and (10) are facially unconstitutional because they are vague, overbroad, and fail strict scrutiny review and Section 3517.21(B)(9) lacks an actual malice requirement. Plaintiff also complains that Sections 3517.21(B)(9) and (10) are unconstitutional as applied to lobbyists taking positions on political issues. Further, Plaintiff complains the investigatory procedure Sections 3517.21(B)(9) and (10) initiates is unconstitutional. Finally, Plaintiff complains that Section 3517.20 is preempted by federal law and is unconstitutional.

3. Those who violate any of the provisions may be subject to fines or criminal penalties or both. R.C. §§ 3517.992-.993.

Jurisdiction and Venue

4. This case raises questions under the First and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983, and thus this Court has jurisdiction over all claims for relief pursuant to 28 U.S.C. §§ 1331 and 1343(a).

5. Venue in the Southern District of Ohio is proper pursuant to 28 U.S.C. § 1391(b) because the facts giving rise to this action occurred in Cincinnati, Hamilton County, Ohio.

Parties

6. Plaintiff Susan B. Anthony List ("SBA List") is a non-stock, non-profit, corporation organized pursuant to Internal Revenue Code Section 501(c)(4), and it has its principal place of business in Washington, D.C. (Articles of Incorporation, Ex. 1.)

7. Defendant members of the Ohio Elections Commission ("Commission") are sued in their official capacity: John Mroczkowski (Chair), Bryan Felmet (Vice Chair), Charles Calvert, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, and Larry Wolpert. Under Ohio law, the Commission has the authority to review, investigate, and conduct hearings upon the filing of a complaint. R.C. §§ 3517.153, 3517.154-157. Additionally, the Commission is empowered to levy fines for violations of Ohio Revised Code Sections 3517.21(B)(9) and (10) and 3517.20. R.C. §§ 3517.992-.993; Ohio Admin. Code 3517-1-14.

8. Defendant Philip Richter, sued in his official capacity, is the Executive Director of and Staff Attorney for the Commission. As Staff Attorney, Defendant Richter has authority to review complaints and make recommendations to the Commission. R.C. § 3517.154; Ohio Admin. Code §§ 3517-1-02(A)(3); 3517-1-10(A).

9. Defendant Representative Steve Driehaus filed a complaint against the SBA List with the Commission, alleging that SBA List violated Ohio Revised Code Sections 3517.21(B)(9) and (10), as well as Ohio Revised Code Section 3517.20. Acting by and through his attorneys and under color of law, Rep. Driehaus issued subpoenas and initiated discovery. Ohio Admin. Code § 3517-1-09.

10. Defendant Jennifer Brunner, sued in her official capacity, is the Ohio Secretary of State. As Secretary of State, Defendant Brunner is under a duty to:

> [R]eport a failure to comply with or a violation of a provision in sections . . . 2517.20 to 3517.22 . . . of the Revised Code, whenever the secretary of state has or should have knowledge of a failure to comply with or a violation of a provision in one of those sections, by filing a complaint with the Ohio elections commission . . .

R.C. § 3501.05(N)(2).

Facts

11. The SBA List is a 501(c)(4) organization designed to advance pro-life causes. Its five-part mission is "to elect pro-life women to Congress through its SBA List Candidate Fund," "to educate voters on critical pro-life issues and on upcoming legislation," "to train and equip pro-life activists nationwide to run successful political and grassroots campaigns," "to promote positive responses in both traditional and new media to dispel the myths and distortions of the abortion lobby," and "to advocate the passage of pro-life legislation in Congress, directly with legislators and through mobilizing direct citizen lobbying." The SBA List works with and associates with like-minded organizations to more effectively advance its mission.

12. The SBA List decided to educate the public and express disapproval concerning the political conduct of certain Congressmen who voted in favor of the Patient Protection and Affordable Care Act ("PPACA"). The PPACA, passed on March 23, 2010, allows for tax-payer funded abortion. The SBA List

chose to disseminate this information during the months immediately leading up to the November 2, 2010, general election to take advantage of heightened political interest.

13. Because of Ohio Congressman Rep. Driehaus' vote in favor of the PPACA, the SBA List created advertising materials (the "Advertisement") which state: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." The Advertisement was scheduled to go up on billboards in the Cincinnati area.

14. On or before October 4, 2010, Paul De Marco, Defendant Driehaus' attorney, communicated with Lamar Advertising Company, the company with whom the SBA List had contracted to post the Advertisements. Lamar agreed it would not post the Advertisements, in exchange for Rep. Driehaus' pledge not to join Lamar in his complaint against the SBA List. (Letter from Paul De Marco to Lamar Advertising Company, Ex. 2.) This agreement chilled SBA List's speech because the planned billboards were not posted.

15. On October 4, 2010, Rep. Driehaus filed a complaint pursuant to Ohio Revised Code Section 3517.153(A) against the SBA List before the Commission claiming the Advertisement violated Ohio Revised Code Sections 3517.21(B)(9) and (10). (Driehaus Complaint, Ex. 3, at 2.) In addition, Rep. Driehaus alleged SBA List failed to comply with Ohio's law governing identification of political communications as required under Ohio Revised Code Section 3517.20. (Ex. 3, at 2.)

16. In the complaint, Rep. Driehaus stated "based on press releases issued by [SBA List], we infer the

SBA List is referring to the health care reform legislation." (Ex. 3, at 2.)

17. On October 13, 2010, Rep. Driehaus filed a second complaint pursuant to Ohio Revised Code Section 3517.153(A) against the SBA List before the Commission alleging additional false statements in violation of Ohio Revised Code Sections 3517.21(B)(9) and (10). (Driehaus Second Complaint, Ex. 4.)

18. Ohio Revised Code Section 3517.21(B)(9) states that no person shall "[m]ake a false statement concerning the voting record of a candidate or public official." R.C. § 3517.21(B)(9).

19. Ohio Revised Code Section 3517.21(B)(10) states that no person shall "Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." *Id.* § 3517.21(B)(10).

20. Those who violate any of these provisions may be subject to fines or criminal penalties or both. R.C. § 3517.992. The Commission may impose fines. *Id.* §§ 3517.992-.993.

21. "Candidate," as used in Ohio Revised Code Section 3517.21(B)(9) and (10), is defined by the Revised Code as follows:

> "Candidate" means any qualified person certified in accordance with the provisions of the Revised Code for placement on the official ballot of a primary, general, or special election to be held in this state, or any qualified person who claims to be a write-in candidate, or who knowingly assents to

> being represented as a write-in candidate by another at either a primary, general, or special election to be held in this state.

Id. § 3501.01(H).

22. Ohio Revised Code Section 3517.20 provides that:

> No . . . other entity . . . shall make an expenditure for the purpose of financing political communications in support of or opposition to a candidate through public political advertising, unless the name and residence or business address of the candidate or of the chairperson, treasurer, or secretary of the campaign committee, legislative campaign fund, political party, or other entity that issues or otherwise is responsible for that political publication or that makes an expenditure for that political communication appears in a conspicuous place on that political publication or is contained within that political communication.

Id. § 3517.20(A)(2).

23. "Candidate" as used in Ohio Revised Code Section 3517.20(A)(2) is defined as

> "Candidate" means any qualified person certified in accordance with the provisions of the Revised Code for placement on the official ballot of a primary, general, or special election to be held in this state, or any qualified person who claims to be a write-in candidate, or who knowingly assents to being represented as a write-in candidate by another at either a primary, general, or special election to be held in this state.

Id. § 3501.01(H).

24. Ohio Revised Code Section 3517.20(A)(1) provides narrowed definitions of "candidate." The provision provides limited definitions for "statewide candidate," "legislative candidate" and "local candidate." R.C. §§ 3517.20(A)(1)(d), (e), (f). However, Section 3517.20(A)(2) employs the general definition of candidate rather than a limited definition.

25. A candidate for federal office must satisfy the requirements of the Constitution of the United States. U.S. Const. art. I. However, a candidate's appearance on a ballot is governed by state law. Ohio law requires a federal candidate to comply with the following: file prior to appropriate deadline (R.C. §§ 3513.05; 3513.257); tender the required filing fee (R.C. §§ 3513.10(A)-(B)); file with the proper state official (R.C. §§ 3513.05, 3513.257, 3513.261), and satisfy any applicable signature requirement (R.C. §§ 3513.05, 3513.257). Therefore, "candidate" as used in Ohio Revised Code Section 3517.20(A)(2) includes a candidate for federal office.

26. The Secretary of State has the duty to bring complaints to the Commission if she has reason to know of or knows of a violation of Ohio Revised Code Sections 2517.20 to 3517.22. R.C. § 3501.05(N)(2). "[S]ince Secretary of State Brunner took office in January 2007, she has filed approximately 764 complaints with the Ohio Elections Commission." *State ex rel. LetOhioVote.Org v. Brunner*, 928 N.E.2d 1066, 1068-69 (Ohio, 2010).

27. In its answer to the complaint, the SBA List asserted, among other arguments, that these provisions are unconstitutional under the First and Fourteenth Amendment and that the Commission

should construe these provisions narrowly to avoid such unconstitutionality.

28. Despite these constitutional assertions and against the recommendation of the Commission's Staff Attorney and Executive Director, Philip Richter, (Commission Probable Cause Hearing Transcript, Ex. 5, at 28), on October 14, 2010, the Ohio Election Commission panel found probable cause that the SBA List violated Ohio Revised Code Sections 3517.21(B)(9) and (10). The panel referred these matters for a hearing before the full Commission. (Ex.5, at 28-29.)

29. The same day, by a vote of two to one, the Ohio Election Commission panel found no probable cause that the SBA List violated Ohio Revised Code Section 3517.20(A)(2). However, one panel member applied Ohio Revised Code Section 3517.20(A)(2) to the planned billboard and voted that there was probable cause the SBA List had violated the disclaimer provision of Ohio law. (Ex. 5, at 22-27.)

30. Pursuant to Ohio law, the hearing before the full commission shall occur "not later than ten business days after referral by the panel unless there is good cause for the matter to be continued." Ohio Admin. Code § 3517-1-10. The hearing was to occur on October 28, 2010, as that date was ten days from the probable cause determination and the next scheduled Commission meeting.

31. In preparation for this hearing, Rep. Driehaus, acting under color of state law and pursuant to the Ohio Rules of Civil Procedure, initiated extensive discovery. Ohio Admin. Code § 3517-1-09. The discovery included a twelve page request for document production. (First Request for Production

of Documents, Ex. 6.) Defendant Driehaus also issued notices of depositions to SBA List's President, Executive Director, and Project Director, (Ex. 6.), and issued numerous subpoenas to third parties with whom the SBA List had associated while the PPACA was under Congressional consideration. (Subpoenas Issued to Third Parties, Ex. 7.) All of the document production and depositions was to be conducted before the October 28, 2010, hearing.

32. Rep. Driehaus' request for document production "cover[ed] the time period from January 1, 2009, through October 19, 2010" and included a request for:

> [A]ll documents, communication (including all letters, e-mails, voice mails, memoranda, notes, and/or other recordings of communication either internally or with any other person or party (other than Respondent's counsel)), testimony, memoranda, affidavits, information or other evidence in Respondent's possession that, in any way, relate to Steve Driehaus, including, but not limited to, his congressional campaign, his voting record, his personal dealings, his party affiliation, his position on health care reform and/or the PPACA, and/or his past public statements.

(Ex. 6, at 9.)

The request also instructed SBA List to produce:

> [A]ll documents, communication (including all letters, e-mails, voice mails, memoranda, notes, and/or other recordings of communication either internally or with any other person or party (other than Respondent's counsel)), testimony, memoranda, affidavits, information or other evidence in Respondent's possession that, in any

way, relate to Steve Chabot, including, but not limited to, his congressional campaign, his voting record, his personal dealings, his party affiliation, and/or his past public statements.

(Ex. 6, at 11.)

Further, the SBA List was directed to disclose to Representative Driehaus "all letter, e-mails voice mails, memoranda, notes, recordings, or other communication between [SBA List]" and the United States Conference of Catholic Bishops, the Family Research Council, any member of Congress or congressional staff members, any employee of the Obama Administration or Executive Branch, the Republican National Committee, The Ohio Republican Party, and the Republican House Campaign Committee. (Ex. 6, at 12-14.)

33. In addition to complying with Rep. Driehaus' discovery and deposition requests, SBA List also faced possible investigatory demands from the Commission. If the Commission had determined the evidence insufficient to make a dispositive determination regarding the complaint, it is empowered to order its own investigation. R.C. § 3517.155(B).

34. The hearing before the full Ohio Elections Commission, scheduled for October 28, 2010, never occurred. And on November 12, 2010, Rep. Driehaus filed a motion to withdraw his complaints. (Motion to Withdraw Complaints, Ex. 8.) On November 15, 2010, the Commission granted a continuance until the December 2, 2010 meeting, at that commission meeting Rep. Driehaus' motion to withdraw his complaints against the SBA List was granted. (E-mail Message from the Commission, Ex. 9.)

35. The investigatory procedure provided for by Sections 3517.21(B)(9) and (10) chills and burdens SBA List's speech. Had Rep. Driehaus not voluntarily dismissed his complaints, SBA List would have been required to turn over sensitive and confidential strategy materials regarding its past expressive communications and associations as part of its lobbying activities. It faces the same prospect in the future if another complaint is brought against it.

36. The SBA List's speech was also burdened as a result of Defendant Driehaus' complaints themselves. The SBA List had to protect its own interests by requesting documents and depositions of its own further burdening protected speech, as well as responding to the onerous document production request on a short time-table.

37. Representative Driehaus' filing of the complaints pursuant to Ohio law chilled and burdened the SBA List's speech in the crucial last weeks leading up to the November 2, 2010, general election. Such chill and burden cause irreparable harm.

38. The SBA List's speech was chilled because the SBA List was unable to post its planned billboards as a result of Defendant Driehaus' complaints. Even if the SBA List was able to secure other billboards, its original speech remained chilled.

39. The SBA List faces the prospect of its speech and associational rights again being chilled and burdened by Ohio's unconstitutional law. Any complainant can hale the SBA List before the OEC, forcing it to expend time and resources defending itself. The complainant can also initiate discovery, forcing the SBA List to turn over sensitive and

confidential strategy materials regarding its past expressive communications and associations as part of its efforts to educate and influence the public.

40. That these materials can be required to be turned over to the SBA List's political opponent(s) with inadequate First Amendment justification further chills and burdens future expressive and associational communications with like-minded groups and legislators.

41. Rep. Driehaus has publicly indicated he may run for Congress again in the future. (December 9, 2010 Article - Driehaus May Run Again, Ex. 10, at 3.)

42. The SBA List intends to engage in substantially similar activity in the future.

43. The SBA List has no adequate remedy at law.

Count I

Ohio Revised Code § 3517.21(B)(9) Is Facially Unconstitutional.

44. The SBA List realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

45. Ohio Revised Code Section 3517.21(B)(9) states that no person shall "[m]ake a false statement concerning the voting record of a candidate or public official." R.C. § 3517.21(B)(9).

46. Section 3517.21(B)(9) is unconstitutional because it lacks an "actual malice" requirement. *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

47. Section 3517.21(B)(9) is unconstitutionally vague under *Buckley v. Valeo*, 464 U.S. 1 (1976). And Section 3517.21(B)(9) unconstitutionally relies on the intent of the speaker and implications of speech to

ascertain its scope and fails strict scrutiny review. *Briggs v. Ohio Election Commission*, 61 F.3d 487 (6th Cir. 1995).

48. Section 3517021(B)(9) is unconstitutionally overbroad, impermissibly regulating more than express advocacy. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2003).

Count II

Ohio Revised Code § 3517.21(B)(9) Is Unconstitutional as Applied to Lobbyists Taking Positions on Political Issues.

49. The SBA List realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

50. Ohio Revised Code Section 3517.21(B)(9) states that no person shall "[m]ake a false statement concerning the voting record of a candidate or public official." R.C. § 3517.21(B)(9).

51. Section 3517.21(B)(9) is unconstitutional as applied to lobbyists taking positions on political issues, because it unconstitutionally penalizes protected opinions. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

Count III

Ohio Revised Code § 3517.21(B)(10) Is Facially Unconstitutional.

52. The SBA List realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

53. Section 3517.21(B)(10) prohibits the "[p]ost[ing], publish[ing], circulat[ing], distribut[ing],

or otherwise disseminat[ing] a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." R.C. § 3517.021(B)(10).

54. Section 3517.21(B)(10) is unconstitutionally vague under *Buckley v. Valeo*, 464 U.S. 1 (1976). And Section 3517.21(B)(10) unconstitutionally relies on the intent of the speaker and implications of speech to ascertain its scope and fails strict scrutiny review. *Briggs v. Ohio Election Commission*, 61 F.3d 487 (6th Cir. 1995).

55. Section 3517021(B)(9) is unconstitutionally overbroad, impermissibly regulating more than express advocacy. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2003).

Count IV

Ohio Revised Code § 3517.21(B)(10) Is Unconstitutional as Applied to Lobbyists Publishing Positions on Political Issues.

56. The SBA List realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

57. Section 3517.21(B)(10) prohibits the "[p]ost[ing], publish[ing], circulat[ing], distribut[ing], or otherwise disseminat[ing] a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." R.C. § 3517.021(B)(10).

58. Section 3517.21(B)(10) is unconstitutional as applied to lobbyists publishing positions on political issues, because it unconstitutionally penalizes protected opinions. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

Count V

The Investigatory Procedure Sections 3517.21(B)(9) and (10) Initiate Is Unconstitutional.

59. The SBA List realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

60. Ohio Revised Code Section 3517.21(B)(9) states that no person shall "[m]ake a false statement concerning the voting record of a candidate or public official." R.C. § 3517.21(B)(9).

61. Section 3517.21(B)(10) prohibits the "[p]ost[ing], publish[ing], circulat[ing], distribut[ing], or otherwise disseminat[ing] a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."R.C. § 3517.021(B)(10).

62. Investigations pursuant to Ohio Revised Code Sections 3517.21(B)(9) and (10) are unconstitutional governmental interference because they compel disclosure "of past expressions and associations," which chill future expression and association. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

63. The required disclosures of past expressions and associations to a political opponent during an investigation pursuant to Ohio Revised Code Sections 3517.21(B)(9) and (10) have no adequate First

Amendment justification and are therefore unconstitutional. *AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003).

Count VI

The Disclaimer Provision Required Under Section 3517.20(A)(2) Is Unconstitutional as Applied to Speech Pertaining to Federal Election Campaigns.

64. The SBA List realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

65. Ohio Revised Code Section 3517.20(A)(2) states:

> No . . . other entity . . . shall make an expenditure for the purpose of financing political communications in support of or opposition to a candidate through public political advertising, unless the name and residence or business address of the candidate or of the chairperson, treasurer, or secretary of the campaign committee, legislative campaign fund, political party, or other entity that issues or otherwise is responsible for that political publication or that makes an expenditure for that political communication appears in a conspicuous place on that political publication or is contained within that political communication.

R.C. § 3517.20(A)(2).

66. The definition of "candidate" as used in Ohio Revised Code Section 3517.20(A)(2) includes candidates for federal office. "Candidate" is defined as "any qualified person certified in accordance with the provisions of the Revised Code for placement on the official ballot of a primary, general, or special election to be held in this state . . ." Ohio Revised

Code § 3501.01(H). Because a candidate for federal office must be certified for placement on the ballot pursuant to Ohio Revised Code, (R.C. §§ 3513.05, 3513.257, 3513.10, 3513.261), this definition reaches candidates for federal office.

67. The Federal Elections Campaign Act provides that "the provisions of this Act . . . supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453(a).

68. The Federal Elections Campaign Act preempts application of Ohio Revised Code Section 3517.20(A)(2) to speech pertaining to a federal campaign. 2 U.S.C. § 453(a).

69. Application of Ohio Revised Code Section 3517.20(A)(2) to the SBA List's speech in a federal election is unconstitutional as a violation of the Supremacy Clause of the Constitution of the United States.

Prayer for Relief

Wherefore, Plaintiff requests the following relief:

70. Declare Ohio Revised Code Section 3517.21(B)(9) facially unconstitutional;

71. Declare Ohio Revised Code Section 3517.21(B)(9) unconstitutional as applied to lobbyists taking positions on political issues;

72. Declare Ohio Revised Code Section 3517.21(B)(10) facially unconstitutional;

73. Declare Ohio Revised Code Section 3517.21(B)(10) unconstitutional as applied to lobbyists publishing positions on political issues;

74. Declare Ohio Revised Code Section 3517.20(A)(2) unconstitutional as applied to organizations' speech pertaining to federal elections;

75. Enjoin the Ohio Elections Commission and Secretary of State from enforcing Ohio Revised Code Sections 3517.21(B)(9) and (10) against Susan B. Anthony List and others similarly situated;

76. Enjoin the Ohio Elections Commission and Secretary of State from enforcing Ohio Revised Code Sections 3517.20(A)(2) against Susan B. Anthony List and others similarly situated;

77. Enjoin the Ohio Elections Commission from engaging in any investigatory procedure initiated by Ohio Revised Code Sections 3517.21(B)(9) and (10) against Susan B. Anthony List and others similarly situated;

78. Enjoin Representative Steve Driehaus, his agents and attorneys, from acting under the color of law by issuing subpoenas relating to Rep. Driehaus' claims against the Susan B. Anthony List under Ohio Revised Code Sections 3517.21(B)(9) and (10);

79. Grant Plaintiff Susan B. Anthony List its costs and attorneys fees under 42 U.S.C. Section 1988 and any other applicable authority, and

80. Grant any and all other such relief this Court deems just and equitable.

Dated: December 21, 2010

Respectfully submitted,

/s Joe La Rue

Joe La Rue, *Trial Attorney*, Ohio
0080643
jlarue@bopplaw.com
James Bopp, Jr., Ind. # 2838-84*
jboppjr@aol.com
Anita Y. Woudenberg, Ind.
25162-64*
awoudenberg@bopplaw.com
Elizabeth M. Kosel, Fla. # 85098*
ekosel@bopplaw.com
BOPP,COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
Ph.: 812/232-2434
Fax: 812/234-3685
Counsel for Plaintiff

**Pro Hac Vice Admission Granted by this Court on December 10, 2010.*

Verification

I, Emily Buchanan, declare as follows:

1. I am over 18 years of age.

2. I am the Executive Director of the Susan B. Anthony List.

3. If called upon to testify, I would competently testify as to the matters concerning the Susan B. Anthony List.

4. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this Verified Complaint concerning the Susan B. Anthony List and its past and intended activities are true and correct to the best of my knowledge and understanding.

Executed on December 16, 2010.

/s/ Emily Buchanan
Emily Buchanan
Executive Director
Susan B. Anthony List
1707 L Street, NW, Suite 750
Washington, DC 20036

OHIO ELECTIONS COMMISSION

STEVE DRIEHAUS

Complainant,

v.

SUSAN B. ANTHONY LIST

Respondent.

Case Nos. 2010E-084, 2010E-096

COMPLAINANT'S REQUEST TO WITHDRAW ELECTIONS COMPLAINTS

Complainant Congressman Steve Driehaus ("Complainant") hereby requests permission to withdraw the complaints made in Case Nos. 2010E-084 and 096. Respondent Susan B. Anthony List does not oppose Complainant's request.

Respectfully submitted,

/s Paul M. De Marco
Paul M. De Marco (0041153)
Christopher D. Stock (0075443)
WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, Ohio 45202
Telephone: (513) 621-0267
Facsimile: (513) 621-0262

Counsel for Complainant Congressman Steve Driehaus

The Washington Post

Between losing and going home: The House basement

By David A. Fahrenthold
Washington Post Staff Writer
Thursday, December 9, 2010; A01

For most of us, the last stage of grief is acceptance.

For members of Congress, it is a cubicle.

With just a few days left in the lame-duck session, defeated and retiring representatives have had to exchange their grand offices for basement nooks and plastic chairs. There, crowded together in warrens of modular furniture in Rayburn B339, are 39 lawmakers who were beaten after just one or two terms.

These members of the we-hardly-knew-ye club face a particularly vexing question: I was in Congress. What do I have to show for it?

"I laughed at my opponent, who says he wants to shut down the IRS," said Rep. Carol Shea-Porter (D-N.H.), who was elected in 2006. No representative, much less a new one, has that kind of power, of course. That point was driven home to Shea-Porter when some of her own, far more modest priorities, such as an act to increase transparency in campaign spending, were shot down or stymied.

Then Republican Frank Guinta beat her by 11 percentage points in November. He's one of more than 90 freshmen coming in January to the House, where they started out last month in the same basement cubicles while they attended orientation.

"They'll be snapped back to reality," Shea-Porter said. By then, she'll be long gone.

According to lists kept by the newspaper Roll Call, these 39 represent the most freshmen and sophomores defeated in one election since at least 1978.

It used to be that members of Congress tended to stay elected. "Wave" elections came infrequently. And when they did, the group of veteran lawmakers who lost would be replaced by a batch who reigned long enough to become veterans themselves.

Little time to leave a mark

But 2010 brought the third wave election in a row, a Republican rout that took back seats Democrats had won in 2006 and 2008. Its casualties were mostly novices: 13 Democrats who had served two terms and 23 who had served one. The three others who aren't returning are Republicans.

Historians say that just isn't enough time to do much on Capitol Hill.

"The unvarnished truth is that most of them made absolutely no impression whatsoever," said Allan Lichtman, a history professor at American University. "Because, in the House, the leadership runs everything. And the Democrats have enough votes that not many [issues] came down to one single vote."

How did that make them feel? It's hard to know, Lichtman said. These are politicians, after all.

"I wonder how many of them have that much genuine capacity for self-reflection," he said.

Yet, in a series of recent interviews, eight ousted lawmakers reflected on their tenures cut short. Many of them had come to the capital in their own waves, full of ambition. In 2006, new Rep. Phil Hare (D-Ill.) told the Chicago Tribune that his class aimed to make Washington less partisan: "We're tired of the name-calling. We want to get things done."

Now, Hare says he has learned exactly how hard it is to do anything. Once in Congress, he lobbied hard to get a seat on the House transportation committee so he could help pass a huge highway-funding bill that would provide jobs in his district.

But committee members of both parties can't agree on a way to fund the measure. No money, no bill, no jobs.

"You come in wanting to change the world," Hare said. He kept saying he was glad to be there: a guy with two years of community college whose vote counted the same as those of the Ivy Leaguers and lawyers. But, he said, "this is a system that slows you down."

Several outgoing Democrats said they were proud of votes for the health-care overhaul and for financial regulation. But—this is life at the bottom of the majority—the party's leaders got credit for these accomplishments, and key senators won the major concessions for their states.

Low-level House Democrats, whose votes weren't as coveted, got fewer benefits, either material or political.

And they often got the same amount of blame.

"You really think I would vote for a bill that would kill Grandma?" Hare recalled asking a town hall

meeting of his constituents during the health-care debate, after somebody suggested that reform would mean "death panels" for the elderly.

"Some hands went up," Hare said.

'I did my job'

So what *did* the lawmakers do? The answers usually have something to do with earmarks, the targeted funding requests that many new Republican lawmakers are trying to stop. Hare got a Veterans Affairs clinic in his district; Rep. John Hall (D-N.Y.) got $300,000 to replace a water main built with harmful asbestos fibers.

"That's the job of Congress," said Hall, a singer-songwriter whose band Orleans recorded the 1970s hit "Still the One." Now, he's sitting unshaven in a basement cafeteria because there's no room to talk in his new office, Cubicle 44. "I did my job," he said.

The departing members also remembered, fondly, their power to intercede for constituents. As lowly as a freshman is on Capitol Hill, he is a giant to a bureaucrat.

"I was surprised by the extent of power that I had," said Rep. Anh "Joseph" Cao (R-La.). Cao recalled his ability to make Federal Emergency Management Agency officials help his constituents still recovering from Hurricane Katrina. "I can go into a federal agency, and people would jump."

But that wasn't enough: Democrats took back Cao's seat this fall, making him one of the three Republican freshmen to lose. One day before Thanksgiving, his aides were already beginning to pack up the photos that decorated his office. "Do we have bubble wrap?" one called to the other.

Yes, the staffer said. "*Lots* of it?" came the reply. Cao is now in Cubicle 89.

By Dec. 1, those who weren't returning had all moved out of their offices, and workers had removed the metal nameplates by the doors. (The plates are screwed on, not glued, for easy changing.) Some of those nameplates now sit, grandly, in the spare chairs in lawmakers' cubicles.

In the process of moving, some of the lawmakers ran into the next class of freshmen, scoping out the offices for themselves. These encounters sometimes evoked a rare and mysterious emotion on Capitol Hill: empathy.

"We're excited, and then they're kind of down," said Rep.-elect Bobby Schilling (R-Ill.), who beat Hare in November. "You feel kind of bad for them, the ones that are leaving."

Sometime in the next week or two, when Congress finishes its lame-duck session, the outgoing members of Congress will have to surrender their laptops and BlackBerrys, though they get to keep the lapel pins that mark them as a member of Congress.

For now, they work in Rayburn B339, the waiting room to the real world.

"The dominant emotion is pride," said Chris Carney (D-Pa.). He is one of the happier ones. He said he'll miss friends and the chance to tinker with the health-care law. But it was a good run: "Being the lowest life-form in Congress is still not a bad thing."

In Cubicle 48, Rep. Steve Driehaus (D-Ohio) is not as cheerful. Asked if there was anything he'd miss about Capitol Hill, Driehaus acted as if he'd been

asked if he'd miss a toothache. He laughed a short, derisive laugh.

"No," said Driehaus, who was defeated after one term. "It's a job. I mean, I lost an election. I move on. You know, that's the way I view it. I'm not real stuck on being a member of Congress."

Not exactly a ringing endorsement for the place. So, would he ever run again?

"I might," he said.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SUSAN B. ANTHONY LIST,	:	Case No. 1:10-CV-720
Plaintiff,	:	*consolidated with Case No. 1:10-CV-754*
v.	:	
REP. STEVE DRIEHAUS, *et al.*,	:	
Defendants.	:	
COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES,	:	
Plaintiff,	:	SECOND AMENDED COMPLAINT OF PLAINTIFF COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES
v.	:	
OHIO ELECTIONS COMMISSION, *et al.*, and JENNIFER BRUNNER, Ohio Secretary of State,	:	
Defendants.	:	

Now comes the Plaintiff Coalition Opposed to Additional Spending & Taxes (hereinafter referred to as "COAST"), and for its Amended Complaint alleges as follows:

INTRODUCTION

1. This is a civil action for declaratory judgment and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. It challenges the constitutionality of Section 3517.21(B)(9) and Section 3517.21(B)(10) of the Ohio Revised Code collectively, the "Statutes"), as well as the disclaimer requirement of Section 3517.20 of the Ohio Revised Code as it relates to campaigns for federal office and the statutory mandate within Section 3599.42 of the Ohio Revised Code that any violation of Chapter 35 of the Revised Code constitutes a *prima facie* case of fraud.

2. Section 3517.21(B) of the Ohio Revised Code prohibits any person, "during the course of a campaign for nomination or election to public office" by means of "campaign materials" to "knowingly and with intent to affect the outcome of such campaign" from:

> (9) Mak[ing] a false statement concerning the voting record of a candidate or public official;
>
> (10) Post[ing], publish[ing], circulat[ing], distribut[ing], or otherwise disseminat[ing] a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

3. The First Amendment to the United States Constitution guarantees to all Americans the right to speak freely and state their opinion on all matters and issues, including controversial topics. Furthermore, the speech involved in this case is core

political speech for which the First Amendment's protection is at its zenith.

4. Section 3517.21(B)(9) and Section 3517.21(B)(10) of the Ohio Revised Code are unconstitutional because they regulate speech based upon its content and such regulation by the State of Ohio fails to satisfy strict scrutiny.

5. Section 3517.21(B)(9) and Section 3517.21(B)(10) of the Ohio Revised Code are unconstitutional because they are impermissibly vague and overly broad in its regulation of speech.

6. Section 3517.21(B)(9) of the Ohio Revised Code is unconstitutional because it lacks any requirement that actual malice be proven.

7. To the extend they attempt to regulate conduct or speech during the course of a campaign for federal office, Section 3517.21(B)(9) and Section 3517.21(B)(10) of the Ohio Revised Code have been preempted by the Federal Elections Campaign Act of 1971 (as amended) together with the regulations and advisory opinions promulgated thereunder.

8. Section 3517.20 mandates the inclusion of disclaimers on all political publications for or against a candidate (including candidates for federal office) that includes the name and residence or business address of the chairperson, treasurer, or secretary of the organization responsible for publishing the publication.

9. To the extend it attempts to regulate conduct or speech during the course of a campaign for federal office, Section 3517.20 of the Ohio Revised Code has been preempted by the Federal Elections Campaign Act of 1971 (as amended) together with the

regulations and advisory opinions promulgated thereunder.

10. Furthermore, the adjudicatory processes and procedures of the Ohio Elections Commission denies those appearing before the Commission basic procedural and substantive due process right guaranteed by the Fourteenth Amendment, including, without limitation, providing adequate notice and an opportunity to be heard at probable cause hearings.

11. Section 3599.42 of the Ohio Revised Code provides that "[a] violation of any provision of Title XXXV of the Revised Code constitutes a prima-facie case of fraud within the purview of such title." Due to, *inter alia*, the constitutional violations existing in the adjudicatory process and procedures of the Ohio Elections Commission, as well as the absence of any requirement of actual damages be proven, the statutory declaration that any violation of any elections laws constitutes *prima facie* evidence of fraud also denies basic procedural and substantive due process right guaranteed by the Fourteenth Amendment.

12. Those who violate any provisions of Ohio election laws may be subject to fines or criminal penalties or both.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable relief under Acts of Congress, specifically 42 U.S.C. 1983 and 42 U.S.C. § 2000cc, under 28 U.S.C. § 2201(a) to secure declaratory relief, under 28 U.S.C. § 2202 to secure preliminary injunctive relief, and under 42 U.S.C.

§ 1988 to grant Plaintiff's prayer for relief regarding costs, including reasonable attorneys fees.

14. Venue of this action is proper within this judicial district and division pursuant to 28 U.S.C. § 1391(b) because the facts giving rise to this action occurred therein.

PARTIES

15. Plaintiff COAST is an unincorporated association of individuals that operates and has registered with the Hamilton County Board of Elections two political action committees, COAST Candidates PAC and COAST Issues PAC. COAST's activities are focused in southwest Ohio, including the City of Cincinnati and Hamilton County.

16. Defendant Ohio Elections Commission (the "Commission") is an administrative body created under Chapter 3517 of the Ohio Revised Code and charged with the enforcement of various Ohio election laws, including Section 3517.21(B)(9) and Section 3517.21(B)(10) of the Ohio Revised Code.

17. Defendants John R. Mroczkowski, Bryan Felmet, Charles E. Calvert, Jayme P. Smoot, Harvey Shapiro, Degee Wilhelm, and Larry L. Wolpert are currently serving as members of the Ohio Elections Commission (collectively, the "OEC Members"), and they, as well as any successors in office, are sued in their official capacities.

18. In their official capacity, the OEC Members regularly receive, review, and determine cases arising under Title 35 of the Ohio Revised Code, including cases arising under the Statutes.

19. The OEC Members are authorized to render advisory opinions, issue subpoenas, compel the

appearances of witnesses and the production of documents, impose civil fines, direct the removal of a candidate's name from a ballot, and refer matters to a local prosecutor for criminal prosecution in accordance with Section 3517.155(A)(1)(c) and Section 3517.21 of the Ohio Revised Code.

20. Defendant Phillip Richter, sued in his official capacity, is the Executive Director and Staff Attorney for the Commission. As Staff Attorney, Defendant Richter has authority to review complaints and make recommendations to the Commission. Ohio Revised Code § 3517.154; Ohio Admin. Code 3517-1-02(A) & 3517-1-10(A).

21. Defendant Jennifer Brunner, sued in her official capacity, is the Ohio Secretary of State. Pursuant to Section 3501.05(N)(2) of the Ohio Revised Code, Defendant Brunner, as secretary of state, is under an explicit legal duty to:

> report a failure to comply with or a violation of a provision in sections. . . 2517.20 to 3517.22. . . of the Revised Code, whenever the secretary of state has or should have knowledge of a failure to comply with or a violation of a provision in one of those sections, by filing a complaint with the Ohio elections commission . . .

"[S]ince [Defendant] Brunner took office in January 2007, she has filed approximately 764 complaints with the Ohio Elections Commission." *State ex rel. LetOhioVote.Org v. Brunner*, 125 Ohio St.3d 420, 422 928 N.E.2d 1066, 1068-69, 2010-Ohio-1895 ¶ 7.

22. All actions taken or threatened to be taken by the Defendants herein were undertaken under color of state law.

FACTUAL AND LEGAL ALLEGATIONS

Congressman Driehaus and ObamaCare

23. In early 2010, the United States Congress passed and President Obama signed in law a piece of legislation known as the Patient Protection and Affordable Care Act. The Act has also been given the appellation of ObamaCare.

24. One of those who voted in favor of ObamaCare was Cincinnati-area Congressman Steve Driehaus. His vote in favor of ObamaCare was very controversial, especially with respect to the issue of the potential for the federal funding of abortions, for ObamaCare allows for taxpayer-funded abortions.

25. In advance of the election that was held on November 2, 2010, a 501(c)(4) organization known as the Susan B. Anthony List (hereinafter referred to as "SBA List") sought to inform the public of the public conduct of certain members of Congress who voted in favor of ObamaCare, including Congressman Driehaus. To that end, the SBA List arranged for billboard advertisements that would be critical of Congressman Driehaus for his vote on ObamaCare.

26. The SBA List's advertisement stated "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." SBA List planned and actually did have the advertisement displayed on billboards in the Cincinnati area. A copy of the SBA List's advertisement is attached hereto as **Exhibit A**.

27. Thus, the proposed speech of the SBA List did not contain terms of express advocacy, *i.e.*, terms such as vote for, elect, support, cast your ballot for, vote against, defeat, or reject, but was simply a form of issue advocacy.

28. The issue advocacy in which the SBA List sought to engage is a form of core political speech.

29. In response to the efforts of the SBA List to engage in core political speech, Congressman Driehaus, on October 4, 2010, filed a complaint with the Ohio Elections Commission against the SBA List, claiming the billboard advertisement violated Section 3517.21(B)(9) and Section R.C. 3517.21(B)(10) of the Ohio Revised Code.

30. A copy of the complaint that Congressman Driehaus filed against the SBA List is attached hereto as **Exhibit B**.

31. Subsequently, a panel of the Ohio Elections Commission concluded that probable cause existed that the SBA List violated the two state law provisions and referred the matter for a evidentiary hearing before the full Commission.

32. Such a probable cause determination against the SBA List or any other party brought before the Ohio Elections Commission for allegedly violating the Statutes serves as a negative taint against the message and the speaker, all without the opportunity to a full and complete adjudication consistent with due process.

33. The negative taint against the messages and speakers against whom the Ohio Elections Commission has found probable cause of a violation of the Statutes is further exasperated due to the fact that those filing such complaints before the Commission do so shortly before an election so as to obtain a probable cause determination but then, after the election, the complaints are withdrawn and no final adjudication ever occurs.

34. Following the probable cause determination against the SBA List, Congressman Driehaus reportedly sought to engage in extensive discovery and inquiry into the operations and business of the SBA List.

35. But the SBA List is not the only organization critical of Congressman Driehaus' vote in support of ObamaCare and its allowance for the funding of abortions with taxpayer dollars. Plaintiff COAST is also critical of Congressman Driehaus.

36. In connection with its political activities for the election that was held on November 2, 2010, COAST desired to engage in core political speech through its mass e-mail communications and its on-line blog (www.COAST-USA.blogspot.com) and press releases. One such effort included the desire to disseminate an email to its supporters containing factual statements and opinions related to Congressman Driehaus and his support of ObamaCare, as well as his actions against the SBA List before the Ohio Elections Commission.

37. COAST desired to disseminate the e-mail and the information contained therein in advance of the election in order to take advantage of heightened political interest.

38. A copy of the e-mail which COAST desired to send (but did not send) is attached hereto as **Exhibit C**.

39. Thus, the proposed e-mail of COAST vis-à-vis Congressman Driehaus did not contain terms of express advocacy, *i.e.*, terms such as vote for, elect, support, cast your ballot for, vote against, defeat, or reject, but was simply a form of issue advocacy.

40. The issue advocacy in which COAST desired to engage with respect to Congressman Driehaus is a form of core political speech.

41. Part of the content of the political message that COAST desired to send is similar to that sought to be advanced by the SBA List, *i.e.*, that Congressman Driehaus' vote in favor of ObamaCare was a vote for wasting taxpayer dollars on abortions.

42. Yet, the political content of COAST's desired message goes beyond simply declaring that Congressman Driehaus voted in favor of taxpayer-funded abortion. Also in its desired political communication, COAST included criticism directed at Ohio Elections Commission and asserted that Congressman Driehaus, "[k]nowing of the horribly partisan nature of the [Commission] and its history of trampling First Amendment freedoms with tortured interpretations of the truth and 'permissible' discourse," hopes that the Commission will "declare the clearly true statements of the Susan B. Anthony List as false, a completely laughable assertion. Using that partisan and erroneous declaration, Driehaus hopes to discredit Susan B. Anthony List and other critics just before the election."

43. COAST concluded its desired political communication by not only repeating the declaration that Congressman Driehaus voted to fund abortion, but also that he lied about the legal effect of his vote.

44. Congressman Driehaus already demonstrated his complete disregard for the First Amendment by invoking the power and authority of a government agency, *i.e.*, the Ohio Elections Commission, to aid him in squelching a free and critical debate about him.

45. Fearful of finding itself subject to the same fate as the SBA List, *i.e.*, dragged before an inquisitional governmental agency who will sit in judgment of the truth of political speech and being subjected to extensive and intrusive discovery, COAST withheld its dissemination of the proposed e-mail relating to Congressman Driehaus' support of ObamaCare and its funding of abortions.

46. Though Congressman Driehaus lost the election on November 2, 2010, there is the potential that he will he run again for Congress in 2012 (or that he already started his campaign for Congress in 2012).

47. For on the evening of November 2, 2010, Congressman Driehaus declared: "We know how hard it was to work, we know how hard it was to get out there and do our part. We are caught up in a change, caught up in a wave, just like we were brought in on a wave. But *we will be back*."

48. Additionally, news reports indicated that the crowd of supporters of Congressman Driehaus who were with him the evening of November 2, 2010, began shouting or chanting "2012".

49. Even a news story in *The News Record* reporting on the defeat of Congressman Driehaus contained the telling headline of "Driehaus looks to future, 2012".

50. And Congressman Driehaus has since the election declared that he may run again for Congress.

51. Furthermore, according to the website of the Federal Elections Commission, Congressman Driehaus still has an active campaign committee.

52. During the 2012 election cycle, COAST desires to make the same or similar statements about other federal candidates who voted for ObamaCare, as well as about candidates in local or state elections who either voted to support or voiced support of ObamaCare.

53. In order to be able to engage in core political speech critical of an incumbent congressman and protected by the First Amendment, but to be able to do so without being subjected to a modern inquisition by a paternalistic governmental agency, COAST seeks the protection and succour of this Court to vindicate and protects its rights under the First Amendment.

54. COAST's speech is tempered and/or chilled because another entity, SBA List which was disseminating a message similar to that which COAST desired to make, had a complaint filed against it with the Ohio Elections Commission, resulting in subjecting the SBA List to a formal hearing before the Commission, as well as subjecting it to extensive and exhaustive discovery requirements from Congressman Driehaus.

55. In fact, in light of the actions by Congressman Driehaus against the SBA List, *i.e.*, dragging the SBA List before the modern-day inquisition that is the Ohio Elections Commission, COAST refrained from sending the proposed e-mail.

56. Congressman Driehaus' filing of the complaint against the SBA List with the Ohio Elections Commission and pursuant to Ohio law chilled and burdened Plaintiff COAST's speech in the crucial last weeks leading up to the November 2, 2010 general election.

57. In addition to sending the proposed e-mail in advance of the recently conducted election, COAST desires to continue to aggressively engage in the dissemination of information on the actions, comments and political positions of Congressman Driehaus and other members of Congress, and to be able to do so without the fear or threat of being accused of violating either Section 3517.21(B)(9) or Section 3517.21(B)(10) of the Ohio Revised Code together with thus being subject to the harassment of having a complaint filed against it with the Ohio Elections Commission which would then result in subjecting COAST to an inquisition by the a state governmental agency.

Efforts During the Forthcoming Elections for Cincinnati City Council

58. In additional to the foregoing, COAST desires to continue to aggressively engage in the dissemination of information on the actions, comments and political positions of various public officials (most of whom are or will be at some time candidates for public office, at either the federal, state or local level) and to be able to do so without the fear or threat of being accused of violating either Section 3517.21(B)(9) or Section 3517.21(B)(10) of the Ohio Revised Code together with thus being subject to the harassment of having a complaint filed against it with the Ohio Elections Commission which would then result in subjecting COAST to inquisition by the a state governmental agency.

59. For example, in 2011, elections will be held in the City of Cincinnati for the Cincinnati City Council.

60. One major issue in the forthcoming election for Cincinnati City Council will be the effort to introduce

street cars as a mode of public transportation within the City of Cincinnati.

61. In promoting the street cars, officials of the City of Cincinnati have asserted, as factual matter, that the annual operating costs of the street cars will be up to $3 million.

62. However, COAST believes that the operating costs of the street cars will be approximately $9 million.

63. Members of the Cincinnati City Council who have supported the introduction of street cars include council members Jeff Berding, Chris Bortz, Laketa Cole, Roxanne Qualls, Cecil Thomas, Laure Quinlivan and Leslie Ghiz, all or most of whom are eligible to seek re- election to Cincinnati City Council and, based upon information and belief, are expected to seek (or are already in the process of seeking) re-election to city council.

64. Thus, during the course of the forthcoming election for Cincinnati City Council, COAST desires to publish, as a factual matter, the statement that the operating costs of the street cars will be nearly $9 million and to tie such statement to the support of the street cars by particular members of Cincinnati City Council who are or will be seeking election in 2011.

65. Yet, in light of the clearly contrary and directly conflicting factual declaration by officials with the City of Cincinnati, COAST faces the real and imminent prospect of being brought before the inquisitional body that is the Ohio Elections Commission if it should put forth its factual contention, in campaign literature in support or opposition to candidates for city council, that the

operating costs of the streetcar will be nearly $9 million, as opposed to the $3 million which official with the City of Cincinnati have put forth.

66. In light of the prospect of finding itself dragged before an inquisitional governmental agency who will sit in judgment of the truth of political speech and being subjected to extensive and intrusive discovery, COAST has withheld and will continue to withhold, both now and during the course of the forthcoming election for Cincinnati City Council, its dissemination of an e-mail relating to the true operating costs that will be associated with the street cars in the City of Cincinnati.

67. COAST desires to aggressively engage in the dissemination of information on the operating costs for the street cars in the City of Cincinnati and the support of such program by certain members of the Cincinnati City council, but to be able to do so without the fear or threat of being accused of violating either Section 3517.21(B)(9) or Section 3517.21(B)(10) of the Ohio Revised Code, as well as the harassment of having a complaint filed against it with the Ohio Elections Commission which would then result in subjecting COAST to an inquisition by the a state agency.

68. Thus, should COAST publish during the course of the campaign for city council that the operating costs of the streetcar will be nearly $9 million, as opposed to the $3 million which official with the City of Cincinnati have put forth, COAST faces the prospects of being brought before the Ohio Elections Commission and, at a minimum, a probable cause determination being made against it, thus serving to negatively taint both the message and the messenger

in the marketplace of ideas through a governmental dictate.

69. Yet, in light of the existence and on-going threat of being hauled before the Ohio Elections Commission but in an effort to avoid being subjected to such a harassing and threatening process, COAST has and will continue to restrain and temper its speech so that it clearly avoids even the prospect of allegedly violating either Section 3517.21(B)(9) or Section 3517.21(B)(10) of the Ohio Revised Code. But in so doing, COAST inevitably will have restrained from engaging in speech that is protected by the First Amendment.

70. Plaintiff COAST has no adequate remedy at law.

COUNT I

Ohio Revised Code § 3517.21(B)(9) is Facially Unconstitutional

71. COAST restates and incorporates by reference all of the allegations contained in all of the preceding paragraphs

72. Section 3517.21 (B)(9) of the Ohio Revised Code is unconstitutional because it lacks an "actual malice" requirement. *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

73. Section 3517.21 (B)(9) is unconstitutionally vague and overly broad in the speech in which it seeks to regulate. Additionally, Section 3517.21 (B)(9) unconstitutionally relies on the intent of the speaker and implications of speech to ascertain its scope. *Briggs v. Ohio Election Commission*, 61 F.3d 487 (6th Cir. 1955).

COUNT II

Ohio Revised Code § 3517.21 (B)(9) is Unconstitutional

74. COAST restates and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

75. Section 3517.21 (B)(9) as applied to citizens and organizations taking positions on political issues unconstitutionally penalizes protected opinion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)

COUNT III

Ohio Revised Code § 3517.21(B)(10) is Facially Unconstitutional

76. COAST restates and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

77. Section 3517.21 (B)(10) is unconstitutionally vague and overly broad in the speech in which it seeks to regulate. Additionally, Section 3517.21 (B)(10) unconstitutionally relies on the intent of the speaker and implications of speech to ascertain its scope. *Briggs v. Ohio Election Commission*, 61 F.3d 487 (6th Cir. 1955).

COUNT IV

Ohio Revised Code § 3517.21 (B)(10) is Unconstitutional

78. COAST restates and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

79. Section 3517.21 (B)(10) as applied to citizens and organizations taking positions on political issues unconstitutionally penalizes protected opinion.

Milkovich v. Lorain Jouranl Co., 497 U.S. 1, 20 (1990).

COUNT V

Ohio Revised Code § 3517.21 (B)(9) Has Been Preëmpted by Federal Law

80. COAST restates and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

81. The Federal Elections Campaign Act (FECA), 2 U.S.C. § 431 *et seq.*, includes an explicit preëmption provision, which states that "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State Law with respect to election to Federal office." 2 U.S.C. § 453.

82. Section 453 is intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal offices and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 10 (1974).

83. Section 3517.21 (B)(9) of the Ohio Revised Code has been preëmpted by the FECA to the extent it is applied or attempted to be applied to regulate conduct or speech during the course of a campaign for federal office.

84. Thus, to the extent the Defendants seek or claim the right to regulate conduct and speech during the course of a campaign for election to a federal office, Section 3517.21(B)(9) of the Ohio Revised Code has been preëmpted by the FECA.

COUNT VI

Ohio Revised Code § 3517.21(B)(10) Has Been Preëmpted by Federal Law

85. COAST restates and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

86. Section 3517.21(B)(10) of the Ohio Revised Code has been preëmpted by FECA to the extent it is applied or attempted to be applied to regulate conduct or speech during the course of a campaign for federal office.

87. Thus, to the extent the Defendants seek or claim the right to regulate conduct and speech during the course of a campaign for election to a federal office, Section 3517.21(B)(10) of the Ohio Revised Code has been preëmpted by FECA.

COUNT VII

Ohio Revised Code § 3517.20 Has Been Preëmpted by Federal Law

88. COAST restates and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

89. Section 3517.20 of the Ohio Revised Code has been preëmpted by FECA to the extent it is applied or attempted to be applied to regulate conduct or speech during the course of a campaign for federal office.

90. Notwithstanding the fact that the Federal Election Commission has declared the disclaimer requirements of Ohio law have been preëmpted by FECA to the extent such requirements are attempted to be applied to campaigns for federal office, the Ohio

Elections Commission has exercised and has continued to exercise jurisdiction over complaints alleging violation of the disclaimer requirement even in cases involving federal elections.

91. In fact, with respect to the complaint filed against the SBA List by Driehaus which included an alleged violation of the disclaimer requirement of Section 3517.20 of the Ohio Revised Code, the Ohio Elections Commission proceeded to exercise jurisdiction over that allegation and, thus, subjected the SBA List to the hassle of having to defend such an allegation.

92. COAST desires to advocate fully and freely with respect to federal officeholders and federal election without subjecting itself to the forced speech provisions of Ohio's disclaimer requirements. But, in light of the Ohio Election Commission's failure to recognize the preemptive effect of FECA with respect to the disclaimer requirements, COAST must either engage in speech the content of which is mandated by the government or engage in speech which would be violative of Section 3517.20 of the Ohio Revised Code and face the prospect of finding itself subject to the same fate as the SBA List, *i.e.*, dragged before an inquisitional governmental agency who purports to have jurisdiction over a state law provision which has been preëmpted by federal law.

93. Thus, to the extent the Defendants seek or claim the right to regulate conduct and speech during the course of a campaign for election to a federal office, Section 3517.20 of the Ohio Revised Code has been preëmpted by the FECA.

COUNT VIII

The Processes and Procedures of the Ohio Elections Commission Result in a Violation of Substantive and Procedural Due Process Rights

94. COAST restates and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

95. From the moment of the initial complaint being filed with the Ohio Elections Commission, any person simply accused of violation either Section 3517.21 (B)(9) or Section 3517.21 (B)(10) of the Ohio Revised Code are subject to an arbitrary and capricious procedure and process sufficient to constitute a denial of substantive and procedural due process. Such procedures and process allow for broad and unlimited intrusion into the associational rights of political organizations, as well as the inherent harassment attendant with defending one's speech.

96. For example, the Defendants will and have conducted probable cause hearings on complaints alleging violations of the Ohio elections law, including Section 3517.21(B)(9) or Section 3517.21(B)(10) of the Ohio Revised Code, yet have failed to provide timely notice of such hearing or the opportunity to be heard at the hearing.

97. Additionally, most of the members of the Ohio Elections Commission lack any legal experience or training. Yet, these governmental bureaucrats are empowered to find violations of the law by determining complex legal issues, including core First Amendment issues, and they are also empowered to impose sanctions and fines.

98. The deficiency in the legal training and background of the members of the Ohio Elections Commissions has a direct impact on the constitutional rights of those appearing before it, including a complete misapprehension of the legal concepts of actual malice, clear and convincing evidence, and the objective standard for assessment of First Amendment cases.

99. In light of the foregoing constitutional infirmities with respect to the process and

100. In order to avoid such an arbitrary and capricious process and procedure utilized by the Ohio Elections Commission, COAST (as well as others) has and will necessarily temper the exercise of their free speech less their constitutional rights be trivialized by the process and procedures of the Commission.

PRAYER FOR RELIEF

Wherefore, Plaintiff COAST requests the following relief:

- declare Sections 3517.21(B)(9) and 3517.21(B)(10) of the Ohio Revised Code facially unconstitutional;
- declare Sections 3517.21(B)(9) and 3517.21(B)(10) of the Ohio Revised Code unconstitutional as applied to citizens and organizations taking positions on political issues;
- declare Sections 3517.21(B)(9) and 3517.21(B)(10) of the Ohio Revised Code being preempted by the Federal Elections Campaign Act (FECA), 2 U.S.C. § 431 *et seq.*, as it relates to the conduct and speech in campaigns for election to federal office;

- enjoin the Ohio Secretary of State from investigating or making any referrals to the Ohio Elections Commission for alleged violations of Sections 3517.21(B)(9) and 3517.21(B)(10) of the Ohio Revised Code;
- enjoin the Ohio Elections Commission from enforcing Sections 3517.21(B)(9) and 3517.21(B)(10) of the Ohio Revised Code against COAST and others similarly situated;
- declare Sections 3517.20 of the Ohio Revised Code being preempted by the Federal Elections Campaign Act (FECA), 2 U.S.C. § 431 *et seq.*, as it relates to the conduct and speech in campaigns for election to federal office;
- enjoin the Ohio Elections Commission from enforcing Sections 3517.20 of the Ohio Revised Code against COAST and others similarly situated as it relates to the conduct and speech in campaigns for election to federal office;
- enjoin the Ohio Secretary of State from investigating or making any referrals to the Ohio Elections Commission for alleged violations of Sections 3517.20 of the Ohio Revised Code as it relates to the conduct and speech in campaigns for election to federal office;
- enjoin the Ohio Elections Commission from enforcing Sections 3517.20 of the Ohio Revised Code against COAST and others similarly situated as it relates to the conduct and speech in campaigns for election to federal office;
- grant such remedial relief as the Court deems appropriate in order to remedy or rectify the arbitrary and capricious procedures and processes

of the Ohio Elections Commission which result in a denial of substantive and procedural due process;

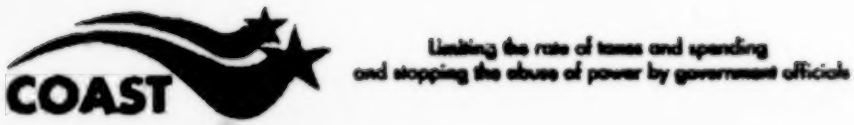
- grant Plaintiff COAST its costs and attorneys fees under 42 U.S.C. 1988 and any other applicable authority; and
- grant any and all other such relief this Court deems may be just and equitable.

Respectfully submitted,

/s/ Curt C. Hartman
Curt C. Hartman (0064242)
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, Ohio 45102
Telephone: (513) 752-8800
Email: hartmanlawfirm@fuse.net

Christopher P. Finney (0038998)
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Avenue
Cincinnati, Ohio 45208
Telephone: (513) 533-2980
Facsimile: (513) 533-2990
Email: cfinney@fssp-law.com

Attorneys for Plaintiff Coalition Opposed to Additional Spending & Taxes



COAST ⚠ COAST ⚠ COAST

ACTION ALERT

Despite denials, Driehaus *did* vote to fund abortions with tax dollars Ohio Elections Commission complaint filed to obscure undeniable truth of his healthcare vote

Steve Driehaus *did* vote to use tax dollars for abortions

The Ohio Elections Commission is a bizarre panel that frequently intrudes into First Amendment liberties of candidates and others participating in political discussion, claiming "false statements" that are really fair and ordinary discourse, a practice that should frighten lovers of our cherished First Amendment Freedoms.

Thus, it comes as no surprise that liberal democrat Steve Driehaus *would bring a "False Statements" Complaint against the Susan B. Anthony List for its erection of billboards in Driehaus' district accusing him of voting for "tax-payer funded abortion."*

First, the statement by the Susan B. Anthony List is absolutely true. COASTers will remember the initial steadfast refusal by Congressman Bart Stupack (D-PA) and other so-called conservative democrats to vote for Obama's healthcare bill because they rightly claimed it allowed for funding abortion. (They were right then, of course.) Then, based upon a flimsy and

entirely repealable "executive order" of Obama's, switched their votes in the final hours allowing for its passage.

Well, numerous scholarly articles explaining the treachery have been written showing irrefutably that the Driehaus vote in favor of Obamacare undeniably *was* a vote for wasting tax dollars on abortions. Read "*Health Care Bill Will Fund Abortions Despite Promised Obama Executive Order*," "*Abortion: Which Side Is Fabricating?*" *from Factcheck.org*, and "*Healthcare Bill Rife with Provisions Funding Abortion*"

Douglas Johnson, legislative director for the National Right to Life Committee says "the bill backed by the White House (H.R. 3200) explicitly authorizes the government plan to cover all elective abortions." This is an unambiguous statement that Factcheck.org determined to be absolutely true.

Now, Driehaus must know that his vote did allow taxpayer funding of abortions, so why would he bring the OEC Complaint?

Knowing of the horribly partisan nature of the OEC and its history of trampling First Amendment freedoms with tortured intrepretations of the truth and "permissible" discourse, Driehaus hopes that the OEC will declare the clearly true statements of the Susan B. Anthony List as false, a completely laughable asserrtion. Using that partisan and erroneous declarion, Driehaus hopes to discredit Susan B. Anthony List and other critics just before the election.

Driehaus, thus, has performed the quintuple play of evil of (1) voting to fund abortions to begin with, (2) showing contempt for the Constitution with that

pernicious vote, (3) lying about the legal effect of his vote, (4) expressing distain for the voters by thinking that they would buy his lie, and (5) thumbing his nose at the First Amendment by hoping a government agency would help him squelch a free debate of the issue.

To which we say: What a creep!

And yes, Steve Driehaus *did* vote to fund abortions. He most certainly did.

Ohio Elections Commission

STEVE DRIEHAUS 3502 Boudinot Avenue Cincinnati, Ohio 45211 *Complainant,* v. SUSAN B. ANTHONY LIST 1707 L Street NW, Suite 750 Washington, DC 20036 *Respondent.*	Case No. 201 0E-084

Affidavit of Susan B. Anthony List

I, Emily Buchanan, being first duly cautioned and sworn, state as follows:

1. I am an adult, over eighteen years of age.

2. I am the Executive Director of the Susan B. Anthony List ("SBA List"), a 501(c)(4) organization designed to advance pro-life causes. As Executive Director, I have personal knowledge of the SBA List and its activities, and if called upon to testify I would testify competently as to the matters stated herein.

3. SBA List was founded in 1992 and has a five-point mission seeking to defend unborn lives and place itself in a strategic position to pass pro-life legislation. Specifically, SBA List seeks to (1) Elect pro-life women to Congress through our SBA List Candidate Fund; (2) Educate voters on critical pro-life issues and on upcoming legislation; (3) Train and

equip pro-life activists nationwide to run successful political and grassroots campaigns; (4) Promote positive responses in both traditional and new media to dispel the myths and distortions of the abortion lobby; and (5) Advocate passage of pro-life legislation in Congress, directly with legislators and through mobilizing direct citizen lobbying.

4. To advance this mission, the SBA List launched a project to inform constituents of Representatives who voted in favor of the Patient Protection and Affordable Care Act ("PPACA").

5. It is SBA List's understanding that the PPACA was passed by Congress and signed into law by President Obama in 2010. It is also the SBA List's understanding that President Obama subsequently issued an Executive Order (EO 13535) which did not and could not alter the authorizations contained in the law as enacted by Congress.

6. The PPACA, as enacted, contained multiple provisions that implicitly or explicitly authorized federal coverage of abortion in various programs created or expanded by the law. The law as enacted contained no bill-wide, permanent prohibition on federal funding of abortion, such as the Stupak-Pitts amendment that was approved by the House of Representatives on Nov. 7, 2009. If the law as enacted had contained such a bona fide prohibition, no Executive Order would have been necessary. Without such a prohibition, no Executive Order could have been sufficient to prevent taxpayer funded abortions under authorities created by the act. The actual Executive Order contained narrowly worded directives that spoke directly to only two specific components of the 906-page law, and that were

inadequate to address abortion-related concern even with respect to those two specific provisions.

7. The net effect of the President's Executive Order is to still allow for money appropriated under the PPACA—that is, taxpayer funds—to be used to fund abortions. Thus, with or without the Order, the PPACA allows for taxpayer funded abortions.

8. The SBA List arrived at its opinion about the PPACA and the President's Executive Order based upon its research.

9. The SBA List relied on at least 18 documents in reaching its opinion that the PPACA allows for taxpayer funded abortion, a few samples of which shall be identified in the following paragraphs.[1]

10. One document the SBA List relied upon is the United States Conference of Catholic Bishops' *Abortion Funding in the New Health Care Reform Act* (April 12, 2010), which explains that PPACA as originally passed allows for taxpayer funded abortion because it authorizes and appropriates taxpayer money for services at Community Health Centers, and those services are not covered by the Hyde amendment that prohibits federal funding of abortion. Nor are these services subject to the PPACA's own abortion limitation language. Thus, the Community Health Centers will be able to use these taxpayer funds, provided to them as a result of the PPACA, to fund abortions.

11. Another document the SBA List relied upon is the Congressional Research Service's July 23, 2010

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[1] The documents identified in this affidavit are attached as exhibits to SBA List's Answer.

Memorandum, which explains that neither the PPACA nor Executive Order 13535 prevent taxpayer funded abortion from occurring under the auspices of the PPACA in the pre-existing conditions program.(*See* Exh. N.)

12. Another document upon which the SBA List relied is the United States Conference of Catholic Bishops' *Legal Analysis of the Provisions of the Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection* (March 25, 2010), which explains that President Obama's Executive Order, which purported to ensure that federal funds would not be able to be spent on abortion, fails to do so. (*See* Exh. I.)

13. Another document upon which the SBA List relied is the United States Conference of Catholic Bishops, *Issues of Life and Conscience in Health Care Reform: An Analysis of the "Patient Protection and Affordable Care Act" of 2010*, May 24, 2010. It explained that the "Stupak Amendment," offered by Rep. Bart Stupak, would have required that any money appropriated by the PPACA not be used to provide for abortions, which would have eliminated the possibility that taxpayer money appropriated and given to Community Health Centers could be used to fund abortions. That Stupak Amendment was not part of PPACA when enacted into law. The document also explains that under the PPACA federal subsidies in the form of tax credits may be used to help pay for overall health plans whose issuers have decided to include elective abortions. It also explains that what little protection from taxpayer funded abortion the PPACA provides is not permanent, but rather tracks

the Hyde Amendment rider, which must be annually renewed. (*See* Exh. T)

14. The SBA List also relied on National Right to Life Committee's press release: *in new rule published today, Obama Administration backs off funding elective abortions in high-risk insurance program—but vows this is "not a precedent" for decisions on future health programs* (July 29, 2010), which offered additional new evidence that provisions of the PPACA authorized coverage of abortion, and quoted a senior Obama Administration health official as saying that the decision to exclude abortion coverage from the PCIP program would not be a precedent in implementing other programs under the law. (*See* Exh. U.)

15. The SBA List also relied on the statement of Rep. Dan Lipinski (D-IL.), who voted against the passage of the PPACA. *Congressman Lipinski Votes 'No' on Senate Health Care Bill* (March 21, 2010). In his statement Rep. Lipinski said:

> [O]f great concern to me and to a significant majority of my constituents, this bill changes current federal policy and provides funding for abortion. This is not acceptable. It is in direct contradiction of the Hyde Amendment, which for more than three decades has prohibited federally funded abortion. First, the bill allows federal funds to subsidize health plans in the insurance exchanges that cover abortion. For any insurance plan that receives federal subsidies and provides abortion, all participants would be required to contribute at least $1 per month that would fund abortion services, regardless of whether they want abortion coverage or not. It also opens the door for

> Community Health Centers receiving federal funding under the bill to use that money to pay for abortion. I do not believe the last minute effort to address these concerns through an Executive Order is sufficient because there is every indication that federal courts would strike down this order, and the order could be repealed at any time in the future.
>
> *Id.* (*See* Exh. V.)

16. SBA List had no reason to believe that the documents it relied on were false or that the sources were lying. SBA List has relied on the sources behind these documents for years and has found them to be credible.

17. Because of Rep. Driehaus' vote in favor of the PPACA, the List created advertising materials (the "Advertisement") which state: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." The Advertisement were scheduled to go on four billboards in the Cincinnati area on October 4th and were to remain up until October 31st.

18. Based upon our research, it is our belief that the PPACA, as passed and enacted into law, and also as governed by the President's Executive Order, allows for taxpayer funded abortion.

I declare under the penalty of perjury under all applicable law that the foregoing is true and correct, to the best of my belief and knowledge. Executed this 11th day of October, 2010, in Washington, D.C.

/s/ Emily Buchanan
Emily Buchannan,

Executive Director of the
Susan B. Anthony List

Signed and sworn before a Notary Public this 11th day of October, 2010, in Washington, D.C.

/s/ Melissa Clement
Notary Public

[SEAL]

Ohio Elections Commission

STEVE DRIEHAUS 3502 Boudinot Avenue Cincinnati, Ohio 45211 *Complainant*, v. SUSAN B. ANTHONY LIST 1707 L Street NW, Suite 750 Washington, DC 20036 *Respondent*.	Case No. 2010E-084, 2010-E-096

Second Affidavit of Susan B. Anthony List

I, Emily Buchanan, being first duly cautioned and sworn, state as follows:

1. I am an adult, over eighteen years of age.

2. I am the Executive Director of the Susan B. Anthony List ("SBA List"), a 501(c)(4) organization designed to advance pro-life causes. As Executive Director, I have personal knowledge of the SBA List and its activities, and if called upon to testify I would testify competently as to the matters stated herein.

3. In the days leading up to final passage of the PPACA, Representative Driehaus made public statements indicating his opposition to the Senate version unless changes were made to the abortion language in the Senate bill. On March 14, 2010, Rep Driehaus stated "While I certainly support this initiative . . . . I will not bend on the principle of

federal funding on abortion . . . They are going to have to do it without me and without other pro-life Democrats". (Ex. EE.) Then on March 17, 2010, Tim Mulvey, a spokesman for Rep. Driehaus stated "Unless changes are made to the abortion language in the Senate version, Rep. Driehaus will be voting no." (Ex. FF.) On March 19, 2010, Mr. Mulvey reiterate Rep. Driehaus' opposition to the Senate version. Mr. Mulvey stated, "If the House votes on the Senate bill, [Rep. Driehaus] won't support it unless a way can be found to change the abortion language."(Ex. GG.) Just before final House passage, on March 20, 2010, Rep. Driehaus indicated the version of the bill awaiting the House vote does not adequately ensure that federal money is not used to pay for elective abortions.(Ex. HH.) However, on March 21, 2010, after the House passed the Senate version of the PPACA with Rep. Driehaus' "yes" vote, Rep. Driehaus said, "I am pleased that this work has led to this executive order prohibiting the use of federal funds for abortion." (Ex. II.)

4. It was based in part upon these statements that SBA List inferred Rep. Driehaus understood abortion funding was contained in the PPACA upon which he voted "yes."

5. Further evidence of Rep. Driehaus' understanding that the PPACA contained abortion funding is that Rep. Driehaus cosponsored Rep. Stupak's proposed "enrollment correction" offered on March 19, 2010. This "enrollment correction" was titled House Concurrent Resolution 254. (Ex. JJ.) This "enrollment correction" if adopted would have added the substance of the Stupak-Pitts Amendment to the final enacted law. However, the "enrollment

correction" failed and no other corrective language was adopted.

6. These public statements of Rep. Driehaus together with his actions in the U.S. House of Representatives indicated to SBA List that the Congressman understood the PPACA provided funding of abortion. SBA List relied, in part, upon these statements and actions in preparing the content of its press release and planned billboards at issue presently.

7. There were no changes made to the Senate version prior to its final passage to remedy the abortion funding contained in the PPACA, to which Rep. Driehaus expressed opposition as late as March 20, 2010, the day before final passage.

8. SBA List relies upon the analysis of National Right to Life Committee ("NRLC") in assessing legislation that impacts pro-life issues. NRLC is a reliable source for information as well as analysis on such issues. During the health care reform debate and after the enactment of the PPACA, SBA List relied upon NRLC's analysis.

9. NRLC consistently advocated publicly throughout the health care debate for the addition of pro-life language consistent with the Stupak-Pitts Amendment to the Senate bill. NRLC's strong opposition to the Senate language, the PPACA, is evidenced in letters dated: December 7, 2009, (Ex. K.K), December 18, 2009, (Ex. LL), December 20, 2009,(Ex. F), December 22, 2009, (Ex. G), January 14, 2010, (Ex. MM), and March 19, 2010 (Ex. H).

10. To the best of SBA List's knowledge, Kristen Day's allegation, contained in her sworn Second Affidavit a statement, that NRLC indicated the

Senate version of PPACA did not provide for taxpayer funding of abortion, is mistaken. Such a statement by the NRLC would have been inconsistent with the NRLC's position throughout the entirety of the health care reform debate. Furthermore, such an implication is inconsistent with the publicly released letters written closest to the time of NRLC's alleged statement, the letters of NRLC of December 22, 2009, (Ex. G), and January 14, 2010, (Ex. MM).

11. SBA List does not recall being at any meeting at which Doug Johnson of NRLC said that the PPACA does not contain abortion funding, or anything similar to that language. Nor does SBA List recall being present at the January 6, 2010 briefing during which Ms. Day alleges Doug Johnson's statement was made.

12. On Tuesday, October 5, 2010, SBA List was notified via Rep. Driehaus' First Complaint that the planned billboards would not be posted because the First Complaint included a copy of the October 4, 2010 letter Mr. De Marco sent to Lamar Advertising Company ("Lamar"). (Attached to Driehaus' First Complaint.) Mr. De Marco, counsel to Rep. Dreihaus, expressed in the letter the agreement reached between Lamar and Rep. Driebaus. The letter indicates that Lamar would not post the signs until the Complaint has been ruled upon by the OEC in exchange for not being joined to the October 5, 2010, First Complaint filed by Rep. Driehaus, which at the time of the letter had not yet been filed.

13. It is SBA List's opinion that Lamar did not post the billboards as a direct result of the letter from De Marco. On September 29, 2010, Lamar provided confirmation that all was "good to go!" (Ex. NN.)

However, less than one week later, with no further communication from Lamar, SBA List was told in response to an inquiry that the billboards would not be posted "until after the [OEC] hearing." This change came after the billboard message was approved and verified by Lamar.

14. It is SBA List's opinion that this letter sent by Mr. De Marco to Lamar in the heat of an election season contained veiled threats and that as a result of these veiled threats Lamar would not post the planned billboards. The subtext of the letter was if Lamar did not comply with De Marco's suggestion then Lamar would be sued as well and haled before the OEC. The end result is that the billboards never were posted.

15. It is SBA List's opinion that Driehaus' threat was the same as telling Lamar: "Don't post the billboards." In other words, it is SBA List's opinion that the threat was an order.

16. On November 2, 2010, attorneys for SBA List received a letter from counsel for Lamar. They forwarded that letter to SBA List, which has reviewed it. The letter states that Rep. Driehaus' attorney made "demands and threats of litigation" if it placed SBA List's billboards. (Ex. OO.)

17. The letter also stated, "Your client [SBA List] initially sought to have a message advertised that was determined by the Ohio Elections Commission at a Probable Cause Hearing to violate Ohio law." (Ex. OO.) The letter continued, "Lamar advised your client that it was willing to advertise any alternative message that was lawful, and would expedite preparation of the copy, but your client failed to provide an alternative message." (Ex. OO.)

18. Additionally, Kristen Day, Executive Director of Democrats for Life of America, stated in her Second Affidavit "[T]he SBA List and other pro-life groups have continued since then, [early January 2010], to falsely characterize the health care reform law as providing taxpayer funding for abortion." Ms. Day's statement contradicts her actions throughout the PPACA debate as evidenced by a March 5, 2010 email message. (Ex. PP.) In the email message, Ms. Day indicated her understanding that abortion funding was contained in the PPACA and passage of such language had to be prevented. This email message also demonstrates her coordination with other pro-life groups efforts to lobby the pro-life Democrats in the final weeks of debate.

19. Ms. Day worked with other pro-life groups as late as March 19, 2010. (Ex. QQ.) In an email message sent on that date, Ms. Day indicated that it "was going to be a long week" and stated "Let's hope we can keep Clyborn from the votes he needs." (Ex. QQ.) Again, this email message contradicts Ms. Day's statement in her sworn Second Affidavit and indicates that in fact she continued to work with the pro-life groups until final passage to strip abortion funding from the PPACA.

I declare under the penalty of perjury under all applicable law that the foregoing is true and correct, to the best of my belief and knowledge. Executed this 3rd day of November, 2010, in Washington, D.C.

/s/ Emily Buchanan
Emily Buchannan,

Executive Director of the
Susan B. Anthony List

Signed and sworn before a Notary Public this 3rd day of November, 2010, in Washington, D.C.

/s/ Melissa Clements
Notary Public

[SEAL]

CINCINNATI.com

Driehaus moving to Africa

Written by

Howard Wilkinson

hwilkinson@enquirer.com

4:40 PM, Mar. 24, 2011

Steve Driehaus, the West Price Hill Democrat who lost his bid for a second term in Congress last fall, will leave the U.S. in June to become the Peace Corps' director of HIV and AIDS education in the south African nation of Swaziland, the country with the worst HIV problem in the world.

"This is something I felt I needed to do," said Driehaus, 44, who was a Peace Corps volunteer in West Africa in the late 1980s. "This is a job where I can make a difference."

In June, Driehaus, his wife and their three school-age children will move to Swaziland for what he expects to be a two-and-a-half-year assignment.

Many here had speculated that Driehaus, a first-term congressman who was defeated last fall by Republican Steve Chabot, would try to make a comeback in 2012.

Driehaus told the Enquirer Thursday that he is not "completely shutting the door" to a run for office some day, but said he believes it is "time that I do something else. And this is something I believe in."

Swaziland is a land-locked nation about the size of New Jersey, bordered by South African and Mozambique. In recent years, Swaziland passed the

African nation of Botswana as having the highest incidence of HIV infection in the world, with 26.3 percent of adults infected–about 190,000 persons out of a population of 1.4 million, according to the U.S. Agency for International Development.

"This is a nation where 15 percent of the population has been orphaned by AIDS," Driehaus said. "They really need help."

Driehaus will direct a group of about 75 Peace Corps volunteers in Swaziland, all of them doing AIDS and HIV prevention education.

He will hold the title of "country director," which commits him to two-and-half years in that country. After that, Driehaus said, he could accept another two-and-half year stint in Swaziland or request an assignment as country director in another country.

Said Chabot spokesman Jamie Schwartz: "We wish Mr. Driehaus the best of luck in his new role."

FOX 19

Former Representative Steve Driehaus taking family to Africa for Peace Corp work

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By Ethan Goldsmith—email

CINCINNATI, OH (FOX19) — With his political career behind him, former Representative Steve Driehaus and family are headed to Africa to work in the Peace Corp.

Driehaus is heading to Swaziland in Southern Africa to work as the country director there, with a specific focus to help people with HIV and AIDS. Driehaus says, "It's a crisis in Southern Africa, about 27% of all adults in Swaziland are infected with HIV or AIDS, they estimate that about 10,000 households are run by orphans."

Driehaus says before he got into politics, his background was in international development. He went to work for the Peace Corp right after college. He also worked for the US Information Agency doing work in Southern Africa.

"Having this time off allowed me to kind of reassess priorities, obviously spent a lot of time talking to my wife, talking to my kids, seeing what the next move was, that made sense for us and we very much wanted to do this, so we're all on-board," said Driehaus.

He says it's going to be a great experience for his kids and for their whole family.

Driehaus will be heading to Swaziland in June, and his family will join him soon after that.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

SUSAN B. ANTHONY LIST, Plaintiff, v. REP. STEVE DRIEHAUS, et al., Defendants.	Case No. 10-CV-720 Judge Timothy S. Black **Declaration of Marjorie Dannenfelser, President Susan B. Anthony List**

I, MARJORIE DANNENFELSER, declare as follows:

1. I am the President, and one of the original founders, of The Susan B. Anthony List [SBA List], the counterclaim defendant in this action, and make this declaration in support of our Motion for a Protective Order.
2. In my role as President, I direct the mission-related activities of SBA List and serve as its primary spokeswoman. As President, I am responsible to our Board of Directors, and to our more than 365,000 members nationwide.
3. SBA List is an acknowledged leader and coalition-builder among pro-life and social conservative groups. Our mission is to apply intense grassroots pressure on Congress to pass legislation that is consistent with the pro-life message; to assist state activists across the

country to stand up for Life; and to hold state and federal politicians responsible for the votes they cast. To reach these goals, we frequently work collaboratively with other nonprofit organizations, advocacy groups, political entities, and sympathetic elected officials to formulate our message and develop our educational and advocacy campaigns. These organizations include, but are not limited to, social conservative groups such as the U.S. Conference of Catholic Bishops and the Family Research Council; pro-life organizations such as the National Right to Life Committee, Ohio Right to Life, and Americans United for Life; elected officials such as Members of Congress and Senators; and political organizations such as the Republican National Committee, the Ohio Republican Party, and the Republican House Campaign Committee.

4. SBA List has a connected political action committee, the nonpartisan Susan B. Anthony List Candidate Fund, which works to elect pro-life candidates to the U.S. House of Representatives, to the U.S. Senate, and to statewide offices across the country.

5. Because the mission of SBA List and its connected political action committee is to ensure political accountability and to redress our members' individual and collective grievances, we operate in a completely political environment. I make this declaration to claim SBA List's First Amendment privilege as an organization and to protect my own First Amendment rights as individual in this case.

6. Mr. Driehaus' counsel has requested thousands of pages of documents that contain the names and contact information of SBA List members, contributors, coalition partners, Members of Congress, Senators, and their staff members, Executive Branch personnel and agencies, and voters who support or disagree with SBA List activities. In addition, these discovery requests include broad requests for sensitive correspondence, position papers, emails, and other materials in which I, other SBA List personnel, and allies among our coalition partners describe coalition-building efforts, legislative strategy, and plans for advocacy campaigns. These materials describe the range of SBA's planned activities, strategies, and tactics, and reflect the development and formulation of our campaign messages.

7. If they were to be enforced by the courts, these discovery requests would have a substantial chilling effect on SBA List's organizational, associational, coalition-building, lobbying, and advocacy activities. I would not be comfortable, in the future, discussing legislative strategy or advocacy messaging internally within SBA List, or communicating on these matters with allied organizations, if SBA List could so readily be compelled to disclose such confidential discussions and communications to ideological and political adversaries.

8. Likewise, other coalition members have objected to the disclosure of sensitive political

information about coalition activities and strategies, and SBA has had to spend time and considerable money assuring them (and their counsel) that SBA will make every effort to protect the privacy of internal coalition documents. These individuals and organizations have made clear that they are very unlikely to associate with SBA List and share such information in the future if their political opponents will have access to it. Indeed, it is likely that they too will resist discovery in this and higher courts if SBA is compelled to produce the information.

9. If political opponents like Mr. Driehaus and his supporters in the Ohio Democratic Party can force disclosure of private, confidential communications relating to political and lobbying strategy and the formulation of campaign messages and tactics, coalition members, SBA personnel, and Members of Congress, Senators, and their staff will not in the future freely communicate their opinions on proposed or pending legislation, legislative strategy, and political campaign messaging.

10. Moreover, individuals who join, support, and finance SBA List will be deterred from doing so if their names and contact information were to be coercively disclosed. Many members and supporters insist on anonymity in this regard because of fear of reprisals at their places of employment or in social affairs if their pro-life views and support for the pro-Life cause were made publicly known. This deterrent effect would undermine SBA List's mission by

making it harder to recruit members and raise funds.

11. As President of SBA List, I can attest to the thousands of dollars and hundreds of hours that this lawsuit has cost our organization, its coalition partners, and our supporters. The costs of discovery in this suit have already been prohibitively high for a nonprofit advocacy organization like SBA List. Every day that this lawsuit continues detracts from our ability to effectively express our opinions in the current election cycle, and to organize coalitions whose purpose is to express disagreement with, and seek to change, abortion funding in PPACA and other efforts by the Obama Administration to coerce forced participation in abortion and other morally-objectionable behavior. Forced disclosure of internal strategic correspondence and contributor lists will make the political process going forward more difficult and more expensive.

***

I declare under penalty of perjury under the laws of the United States of America that the statements I have made in this declaration are true and correct.

Made this 6th day of August, 2012

/s/ Marjorier Dannenfelser

Majorie Dannenfelser, President
Susan B. Anthony List
1707 L Street, NW, Suite 550
Washington, DC 20036
(202) 223-8073

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

SUSAN B. ANTHONY LIST, Plaintiff, v. REP. STEVE DRIEHAUS, et al., Defendants.	Case No. 10-CV-720 Judge Timothy S. Black **Declaration of Emily Buchanan, Executive Director Susan B. Anthony List**

I, EMILY BUCHANAN, declare as follows:

1. I am the Executive Director of the Susan B. Anthony List, and in that capacity, I am responsible for coordinating, managing and executing SBA List's programs.

2. Because the mission of SBA List and its connected political action committee is to ensure political accountability and redress of our members' individual and collective grievances, I work on a daily basis with coalition members—including social conservative groups, pro-life advocacy organizations, political entities, Members of Congress, Senators, and their staffs, and experts on whom we rely for advice and assistance.

3. Mr. Driehaus' discovery requests required review and analysis of over six-hundred thousand (600,000) documents, some of which contain the names and contact information of SBA List members, contributors, coalition partners, Members of Congress, Senators, and their staff members,

Executive Branch personnel and agencies, and voters who support or disagree with SBA List activities. These documents include sensitive correspondence, position papers, emails, and other materials that describe coalition-building efforts, legislative strategy, and the formulation of campaign messages for our pro-life advocacy campaigns including our efforts to oppose PPACA and to criticize those elected officials who supported it.

4. In addition to SBA List's First Amendment rights, my own right to protect the correspondence in which I engaged during the debate over PPACA from disclosure to Mr. Driehaus and, through him, to pro-choice groups, to the Democratic Party in Ohio and around the country, and to the House and Senate Democratic campaign committees is infringed by this discovery.

5. I engaged in politically sensitive communications with other SBA List personnel, as well as with close allies at other social conservative and pro-life organizations, in the course of formulating our legislative and campaign strategy and message relating to PPACA and those who voted for that legislation in Congress. Were SBA List forced to disclose those communications, I would in the future be extremely reluctant to exercise my First Amendment rights to associate with others and to participate in the development of our advocacy campaigns. Were our ideological adversaries permitted such easy access to SBA List's strategic communications, both internal and with coalition members, then I would not so readily engage in such communications in the future.

6. I have had to deal personally with coalition members in the health-care debate who have raised similar concerns that SBA List will be forced to disclose sensitive political information about coalition activities and strategies and individual positions taken during these debates. Like me, these coalition members would be reluctant to continue these associational and political efforts in the future if such internal correspondence could fall into the hands of their political opponents.

7. I have also had to spend valuable time that could otherwise have been spent on current legislation and the 2012 election cycle with our counsel to ensure that our coalition partners and members and their counsel are kept informed concerning the status of their correspondence, documents, and identifying information.

8. As Executive Director of SBA List, I have personal knowledge of the thousands of dollars we have had to spend defending our First Amendment right to participate actively in the health care debate over abortion funding, and can personally attest to the administrative burden caused to our organization, its employees, and its coalition partners by this lawsuit and Mr. Driehaus' attempts to use it to gain valuable political intelligence for his political allies.

9. Every hour that I spend responding to discovery requests and to other matters relating to the administration of this lawsuit detracts from my ability to devote my time to executing SBA's political and legislative programs. This lawsuit is diverting financial resources that should be devoted to our political and policy message, and the time and money

spent on these burdensome discovery requests substantially detracts from our ability as an organization to carry out our political activities and policy mission.

***

I declare under penalty of perjury under the laws of the United States of America that the statements I have made in this declaration are true and correct.

Made this 6th day of August, 2012

/s/ Emily Buchanan

Emily Buchanan, Executive Vice President
Susan B. Anthony List
1707 L Street, NW, Suite 550
Washington, DC 20036
(202) 223-8073

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

SUSAN B. ANTHONY LIST, Plaintiff, v. REP. STEVE DRIEHAUS, et al., Defendants.	Case No. 10-CV-720 Judge Timothy S. Black **Declaration of The Honorable Marilyn Musgrave, Vice-President, Government Affairs Susan B. Anthony List**

I, MARILYN MUSGRAVE, declare as follows:

1. I am the Vice-President of Government Affairs of the Susan B. Anthony List, and in that capacity, I am responsible for coordinating, managing and executing SBA List's lobbying and political programs, and for dealing personally with Members of Congress and Senators on pending legislation.

2. I served as Member of the United States House of Representatives from the Fourth District of Colorado from 2003-2009. Prior to my election to Congress, I served for two term as a Member of the Colorado Assembly (1994-1998), and for one term as a Member of the Colorado Senate (1998-2002).

3. I work on a regular, if not daily, basis with other social conservative and pro-life organizations, with Members of Congress and Senators, with State legislators and senators, and with political committees and parties concerning pending and proposed legislation, political coalition-building,

political strategy, and the formulation of advocacy campaign messages.

4. Mr. Driehaus' discovery requests threaten not only disclosure of documents that are privileged under the First Amendment, but also of correspondence and working documents that are protected under the Speech & Debate Privilege of Members of Congress—a privilege that is zealously defended by Counsel for the House of Representatives.

5. In my experience as a Member of the House of Representatives, and as a Member of the Colorado House and Senate, I can attest to the absolute necessity for maintaining the confidentiality of correspondence between and among legislators and their constituents. Coalition partners will not be open and honest about disagreements on language, on strategy, on message, and on tactics without assurance that the material will not find its way into the hands of political opponents.

6. Release of the information, correspondence, and documents Mr. Driehaus has requested, to Mr. Driehaus and/or to pro-choice groups, the Democratic Party at the national level, in Ohio and around the country, and to the House and Senate Democratic campaign committees would be a devastating blow to our ability to engage in current strategic planning, to lobby and consult with our political allies on legislative tactics, and to engage in internal debates over statutory language. Coerced disclosure of these private communications will also harm our future legislative advocacy and political campaigns, because efforts by aligned individuals and organizations to associate and cooperate in this regard will be

undermined and deterred by the threat of subsequent disclosure.

7. Release of the information, correspondence, and documents demanded by Mr. Driehaus will make it practically impossible for me to get on the schedules of current Members of Congress, much less to meet privately with them. The lack of confidentiality will effectively destroy my ability to serve as an advocate for SBA's legislative and political efforts.

8. The discovery of internal campaign and lobbying correspondence will make it harder for SBA List to maintain its credibility, to raise funds, and to assure its supporters that they will not be penalized at work, at home, or in their social affairs because they are identified as citizens who are willing to provide tangible, financial, and moral support to the pro-life cause.

9. The debate over whether PPACA funds will pay for abortion is far from over in Congress, in the Executive Branch, in the States and their insurance exchanges, and in the federal and state courts. Information disclosed to Mr. Driehaus' counsel will inevitably be made available to SBA List's political opponents and may possibly be made available to the public generally. Any disclosure of legislative and political strategy will make it much more difficult for us to attain our goal of assuring that taxpayers are not compelled to pay for abortions with their tax dollars, and even limited disclosure to Driehaus and the Ohio Democratic Party will make it far easier for our political opponents to plan political races, select candidates, and to craft their political claims and advertisements.

I declare under penalty of perjury under the laws of the United States of America that the statements I have made in this declaration are true and correct.

Made this 6 day of August, 2012

/s/ Marilyn N. Musgrave

The Honorable Marilyn Musgrave
Vice-President of Government Affairs
Susan B. Anthony List
1707 L Street, NW, Suite 550
Washington, DC 20036
(202) 223-8073

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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FEB 2 4 2014
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No. 13-193

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONERS

CHRISTOPHER P. FINNEY
THE FINNEY LAW FIRM
4270 Ivy Pointe Blvd.
Cincinnati, OH 45245

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Ct.
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan St.
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

DAVID R. LANGDON
JOSHUA B. BOLINGER
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

Library of Congress
Law Library

QUESTIONS PRESENTED

I. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would *certainly* and *successfully* prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors *not* to enforce the law, as seven other Circuits hold?

II. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants below, are Susan B. Anthony List ("SBA") and the Coalition Opposed to Additional Spending and Taxes ("COAST"). No corporation owns 10% or more of the stock of either SBA or COAST.

Respondents, who were Defendants-Appellees below, are the Ohio Elections Commission, its Commissioners (Kimberly Allison, Degee Wilhelm, Helen Balcolm, Terrance Conroy, Lynn Grimshaw, Jayme Smoot, and William Vasil)* in their official capacities, its staff attorney (Philip Richter) in his official capacity, the Ohio Secretary of State (Jon Husted) in his official capacity, and Steven Driehaus.

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* These particular Commissioners have been automatically substituted for their official-capacity predecessors pursuant to Supreme Court Rule 35(3).

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JURISDICTIONAL STATEMENT

The Sixth Circuit entered judgment on May 13, 2013, and denied rehearing en banc on June 26, 2013. Pet.App.64a. Petitioners filed their petition for writ of certiorari on August 9, 2013, and review was granted on January 10, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Addendum hereto reproduces the relevant provision of the Ohio Revised Code.

STATEMENT OF THE CASE

Believe it or not, it is a criminal offense in Ohio, punishable by fines or even imprisonment, to make a knowingly or recklessly "false" statement about a candidate for political office or a ballot initiative. Petitioners are two advocacy groups that sought to challenge that law under the First Amendment. One group criticized a sitting Congressman's support for the Affordable Care Act, labeling his vote for that Act as support for taxpayer-funded abortion. That group was then haled before Ohio's elections commission, which—by a 2-1 vote along partisan lines—found "probable cause" to believe that such speech violated Ohio's false-statement law. The other group wanted to repeat the same message, but refrained from doing so because of that enforcement action.

Despite these concrete injuries, the courts below dismissed the suits, finding the constitutional claims unripe because (i) it was not *certain* that the groups would again be subjected to enforcement action if they repeated their speech; (ii) the commission had not reached a *final* determination on whether their speech was unlawful; and (iii) the *speakers* (SBA and COAST) maintained that their statements were true, even though the elections commission had found probable cause that they violated the law. That holding flies in the face of this Court's justiciability jurisprudence and undermines the most basic First Amendment values. As a practical matter, it also effectively insulates this patently unconstitutional regime from any federal judicial review.

A. Susan B. Anthony List Criticizes Rep. Steve Driehaus, A Member Of Congress, For Supporting The Affordable Care Act.

Susan B. Anthony List ("SBA") is a national pro-life advocacy group. During the 2010 congressional elections, SBA criticized Members of Congress—including Steve Driehaus (D-OH)—who voted for the Patient Protection and Affordable Care Act ("ACA"). SBA issued a press release announcing its plan to "educat[e] voters that their representative voted for a health care bill that includes taxpayer-funded abortion." JA49-50. SBA also planned to erect large billboards in Rep. Driehaus' district, stating: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." Pet.App.3a; JA37 (image of billboard). And, subsequently, SBA paid for radio advertisements to the same effect, *i.e.*, that Driehaus had "voted for taxpayer funding of abortion when he cast his vote for the health care reform bill." JA73.

B. Rep. Driehaus Hales SBA Before The Ohio Elections Commission, Alleging That Its Campaign Speech Is Criminally "False."

After SBA's billboards were reported in the news, Driehaus filed a complaint with the Ohio Elections Commission ("OEC"), alleging that SBA's speech violated Ohio Revised Code § 3517.21(B)(10), which forbids one to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." A related statutory provision proscribes such false statements in ballot issue campaigns. *See* OHIO REV. CODE § 3517.22(B)(2). *See* Pet.App.3a.

Under the Ohio scheme, "any person" may file a complaint with the OEC alleging a violation of this law. *Id.* § 3517.153(A). The OEC has the power to issue judicially enforceable subpoenas "compelling the attendance of witnesses and the production of relevant papers." *Id.* § 3517.153(B). If a complaint alleging a false statement is filed within 60 days of a primary election or 90 days of a general election, the OEC holds an "expedited hearing." *Id.* § 3517.154(A). At that hearing, a three-member panel determines if "[t]here is probable cause to believe that the failure to comply with or the violation of a law alleged in the complaint has occurred." *Id.* § 3517.156(A), (C). If so, the panel must refer the case to the full Commission. *Id.* § 3517.156(C)(2). If the Commission then finds a violation, it "shall refer the matter to the appropriate prosecutor." *Id.* § 3517.155(D)(2).

Violation of the false-statement law constitutes a first-degree misdemeanor. *Id.* § 3599.40. "Whoever violates section 3517.21 or 3517.22 of the Revised Code shall be imprisoned for not more than six months or fined not more than five thousand dollars, or both." *Id.* § 3517.992(V). And an individual who is *twice* convicted of violating Ohio's elections code "shall be disfranchised." *Id.* § 3599.39.

Driehaus' OEC complaint centered on his claim that the Affordable Care Act does not specifically appropriate federal funds for abortions, and that SBA's speech was thus false. The dispute arises primarily from two features of the ACA. *First*, the Act creates a subsidy for lower-income individuals to help pay insurance premiums, with the money sent directly from the federal treasury to the insurer. ACA §§ 1401(a), 1412(c)(2)(A), *codified at* 26 U.S.C. § 36B; 42 U.S.C. § 18082(c)(2)(A). Under the Act, the federal subsidies may be used to subsidize abortion-inclusive coverage, but insurers purportedly cannot use the specific federal subsidy dollars to pay for most abortions. ACA § 1303(b)(2), *codified at* 42 U.S.C. § 18023(b)(2). Rather, insurers must collect a "separate payment" from enrollees and keep this payment segregated from federal funds; only those segregated dollars can be used to pay for abortions. *See* ACA § 1303(b)(2), (C), *codified at* 42 U.S.C. § 18023(b)(2), (C). Driehaus contended that this segregation rule refuted the claim that the Act finances abortion via its subsidy provisions. JA30. SBA and the National Right to Life Committee, in contrast, contend that the segregation rule is a mere accounting gimmick, because money is obviously fungible; federal funds are still being used to help buy abortion-inclusive coverage. *See* JA94-96, 167.

Second, the ACA contains multiple provisions that directly appropriate federal dollars for certain health programs, such as, for example, community health centers. ACA § 10503, *codified at* 42 U.S.C. § 254b-2. These direct appropriations are not within the scope of the Hyde Amendment, which ordinarily prohibits using federal funding for most abortions, but which only applies to funds that flow through the annual appropriations bill for the Department of Health and Human Services. *See* Pub. L. No. 113-6, § 202, 127 Stat. 198, 257 (2013) ("None of the funds appropriated *by this title* shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape ...." (emphasis added)).

With respect to that appropriation (and others like it), Driehaus pointed to an Executive Order issued after passage of the ACA that purports to extend the Hyde Amendment to community health center funds. EXEC. ORDER No. 13535, § 3, 75 Fed. Reg. 15599 (Mar. 24, 2010). But, of course, the need for an Executive Order to prohibit these funds being used for abortions confirms that the Act standing alone does allow for those taxpayer-funded grants to do so. *See* JA88. Moreover, the Hyde Amendment itself authorizes federal funds to pay for abortions at least in some cases (such as rape or to protect the life of the mother), which means that SBA's statements were factually true regardless.

C. The Ohio Elections Commission Complaint Succeeds In Suppressing SBA's Speech.

By moving quickly to stifle SBA's speech, Driehaus managed to keep the billboard from going up. Instead, "the advertising company that owned

the billboard space refused to put up the advertisement after Driehaus' counsel threatened legal action against it" under Ohio's false-statement law. Pet.App.3a. In particular, on the same day as he filed his OEC complaint, Driehaus (through his counsel) sent a letter to the advertising company that was supposed to erect SBA's billboards. JA26. The letter indicated that Driehaus would not file OEC proceedings against the company under the false-statement statute—if it refrained from posting the billboards. The company acceded to that threat and refused to post the billboards. Pet.App.3a.

D. The Commission Finds Probable Cause To Believe That SBA's Speech Was Criminal.

As a result of Driehaus' complaint, SBA was forced to divert its time and resources—in close proximity to the election—to hire legal counsel to defend itself before the OEC. Because Driehaus filed his complaint 29 days before the election, a Commission panel held an expedited probable-cause hearing on it. The panel voted 2–1, with the sole Republican dissenting, to find probable cause that SBA violated the law, and thus to allow the charges to proceed to the full Commission. Dkt. 25-5, at 29. Driehaus then pursued voluminous discovery requests to SBA and third parties. Pet.App.4a. Among other things, Driehaus noticed depositions of three SBA officials and subpoenaed officials of other organizations that, like SBA, understand the ACA as including taxpayer-funded abortion. JA55-58. Driehaus also sought stunningly broad production of documents—including, for instance, communications with ally organizations, political party committees, and Members of Congress and their staff. JA67-71.

E. Coalition Opposed To Additional Spending And Taxes Refrains From Criticizing Driehaus Due To The OEC Enforcement.

Coalition Opposed to Additional Spending and Taxes ("COAST") agreed with SBA's criticism of Driehaus, and wanted to disseminate the following statement: "Despite denials, Driehaus did vote to fund abortions with tax dollars." Pet.App.5a; *see also* JA162 (text of proposed COAST message). But, due to the then-ongoing action against SBA, it was afraid that doing so would expose it to enforcement actions and potential criminal penalties. Pet.App.6a.

F. SBA And COAST Challenge The Ohio Law In Federal First Amendment Lawsuits.

While Driehaus' complaint was pending before the Commission, SBA filed a federal suit challenging the constitutionality of the Ohio law. Pet.App.4a-5a. The district court stayed that suit due to the pending OEC proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). Ultimately, Driehaus lost reelection and the OEC allowed him to withdraw his complaint. JA131. The court then lifted the stay, and consolidated SBA's suit with a separate suit filed by COAST.

SBA and COAST amended their complaints to allege that they wanted to engage in similar speech in the future but were chilled. Pet.App.5a; JA149, 157 (COAST allegation that it "desires to make the same or similar statements about other federal candidates who voted for ObamaCare" during future elections, but would not, due to fear "of finding itself subject to the same fate" as SBA); JA122 (SBA allegation of intent to engage in similar speech). Driehaus filed a defamation counterclaim against SBA based on the abortion-funding "falsehood."

G. The District Court Dismisses Both Suits On Jurisdictional Grounds, But Allows Driehaus' Defamation Suit To Proceed.

After consolidating the suits, the district court dismissed both. As to COAST, the court reasoned that because a "hypothetical person" would have to file a complaint against it, and the OEC would have to issue a "hypothetical finding that there is probable cause to proceed on such," COAST's injury was "far too attenuated." Pet.App.57a. COAST's "subjective chill" was not cognizable injury, either, because the threat of future prosecution was too speculative; "no complaint against COAST has been or is pending before the Commission." Pet.App.58a. Moreover, because COAST maintained that its criticisms of Driehaus were true, it supposedly "has not even alleged any intention not to comply with Ohio's false statement statute." Pet.App.56a.

The court employed similar reasoning to dismiss SBA's suit: SBA lacked standing because it had no evidence that the false-statement law "will be immediately enforced against it." Pet.App.34a. "Whether the Commission, Mr. Driehaus, or the Secretary of State may at some future point seek to enforce Ohio's false statement ... statutes against [SBA] on the basis of some future statement is contingent on a number of uncertain events." Pet.App.26a n.6. Any "chill" of SBA's speech was thus not injury-in-fact. The court added that, while SBA had been subject to enforcement action, its challenge was still unripe because the Commission had not reached a final merits determination. "Without enforcement action pending at any stage, a case or controversy does not exist." Pet.App.29a.

As to Driehaus' counterclaim, the court held that SBA's statements were factually false because the ACA did not directly appropriate federal funds for the express purpose of funding abortions. *See Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 435-36 (S.D. Ohio 2011). Nonetheless, the court later granted summary judgment to SBA, holding that the statements were not defamatory under Ohio law. *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720, 2013 WL 308748, at *3 (S.D. Ohio Jan. 25, 2013).

H. The Sixth Circuit Affirms The Dismissals On Ripeness Grounds.

SBA and COAST each appealed the district court's dismissal of their suits, and the Sixth Circuit resolved both appeals in one opinion. The panel relied on prior Sixth Circuit precedent holding that neither past enforcement actions nor allegations of chill suffices to show injury-in-fact from a speech-suppressive rule; rather, a plaintiff must prove "an imminent threat of *future* prosecution." Pet.App.8a-10a (citing *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955 (6th Cir. 2009); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002)).

Applying that standard, the panel reasoned that the OEC's finding of probable cause was *irrelevant*, because it was not a "final adjudication" of liability. Pet.App.12a. And, while anybody could file an OEC complaint and "set the wheels" of enforcement in motion, the court found it "speculative" that any such complaint would be filed in the future. *Id.* This was because Driehaus' future candidacy was uncertain, and, although SBA had alleged an intent to make the same criticisms about other Ohio candidates who had

supported the ACA, SBA could not identify a specific person who would complain if it did so. Pet.App.12a-14a. Moreover, because SBA "does not say that it plans to lie or recklessly disregard the veracity of its speech," instead maintaining the truth of its position, it also had not "sufficiently alleged an intention to disobey the statute." Pet.App.15a.

The panel observed that COAST's position was "somewhat different" from SBA's, but its conclusion was the same. Pet.App.18a. "COAST has never been involved in a Commission proceeding and no individual has enforced or threatened to enforce the challenged laws against it." *Id.*

SUMMARY OF ARGUMENT

Two terms ago, this Court held that even false statements are protected by the First Amendment. *See United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012). "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.* Indeed, laws proscribing generalized false speech cast "a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id.* at 2548. Even the dissenters there agreed that, at least as to "matters of public concern," laws proscribing false statements would create a "potential for abuse of power" "simply too great" for the First Amendment to tolerate. *Id.* at 2564 (Alito, J., dissenting); *see also id.* at 2555 (Breyer, J., concurring in judgment) ("in political contexts, ... the risk of censorious selectivity by prosecutors is ... high"). As all nine of the Justices correctly recognized, allowing the government to serve as arbiter of political "truth" cannot be squared with basic free-speech principles.

Yet nearly one-third of the states still have statutes prohibiting "false" statements made during political campaigns—often, as in Ohio, with criminal sanctions attached, and enforced by state "Ministries of Truth" like the Ohio Elections Commission. *See infra* at 55. These laws do exactly what *Alvarez* warned against, inserting state bureaucrats and judges into political debates and charging them with separating truth from oft-alleged campaign "lies." Such statutes are almost certainly unconstitutional, yet they play a troubling, harassing role in every political campaign in those states.

In this case and others, however, the Sixth Circuit has misapplied justiciability principles to bar the courthouse door to those directly victimized by Ohio's suppression of core political speech. Indeed, the Sixth Circuit has created a paradigmatic Catch-22, whereby a speech-restrictive law cannot be challenged in federal court before, during, or after OEC enforcement proceedings—only once a speaker has been successfully convicted. Under its decisions, a challenge *prior* to enforcement is too "speculative," even if enforcement proceedings are pending against another speaker based on the *same* speech (COAST). *During* enforcement, *Younger* is invoked to preclude review. And even *after* the statutorily designated "truth commission" finds probable cause that a criminal law has been violated, there is purportedly still no "credible threat of prosecution," even against the *same* speaker for the *same* speech (SBA)—unless, perhaps, he falsely avers that his speech is "false." So political opponents remain free, through the OEC, to compel speakers to defend their speech in burdensome and costly proceedings in the midst of a campaign, with no meaningful judicial review.

Thus, under the decision below, federal judicial review—not only of this law, but of any open-ended, speech-suppressive statute—can only be had once a party is convicted. That is very wrong, and very much at odds with this Court's precedent.

I. As this Court has long recognized, if there exists a "credible threat" that one's speech will be penalized under a speech-suppressive law, a speaker may pursue a pre-enforcement challenge to that law. And this Court has repeatedly found a "credible threat" based on just the existence of the law and the party's intent to take action that may be perceived as violating it. At least absent an express commitment by prosecutors *not* to enforce the law, such a party has a plain basis to fear prosecution. Particularly in the First Amendment free speech context, any contrary rule—*i.e.*, requiring the speaker to suffer indignities, expenses, and penalties before he may adjudicate his constitutional rights—would result in self-censorship, degrading robust political debate.

Here, there can be little doubt that petitioners face *more* than just a "credible" threat if they repeat their criticism of ACA-supporting candidates. The OEC has already found that the criticism "probably" violates the false-statement law. And, under the Ohio regime, *any* citizen who supports the candidate under attack may file a complaint, thereby triggering the expensive, burdensome enforcement proceedings to which SBA has already been subjected once.

II. None of the contrary rationales offered by the court below can withstand even glancing scrutiny. Its rationales are fundamentally incompatible with basic First Amendment values and this Court's consistent precedent.

First, it is irrelevant that *petitioners* believe (correctly) that their statements are true. The *OEC* has declared otherwise, and it is the OEC that is designed to threaten speakers with criminal prosecution and other burdens in the crucial weeks before an election. Moreover, the fundamental reason for protecting even *false* campaign speech is to prevent *truthful* speech from being chilled through fear of burdens like those that SBA faced. It is thus particularly perverse to bar precisely those chilled, truthful speakers from obtaining judicial review; they are the ones who need and deserve it most.

Second, there is no need for a "final," "definitive" ruling by the OEC on the legality of the intended speech *before* a speaker may challenge a law that arguably proscribes it. It is the credible *threat* that creates the impending injury, but the Sixth Circuit effectively requires its *realization*. Plus, the burden of being subject to inquisitorial proceedings is *itself* injury, even if the OEC ultimately exonerates the speaker. The Sixth Circuit's regime would insulate even the most open-ended speech codes from review unless someone is brave enough to expose himself to those procedural burdens and criminal penalties.

Third, the "chill" from a speech-restricting law that arguably reaches the plaintiff's speech is hardly "subjective." When there exists a "credible threat" of prosecution for violating a speech restriction, the state has clearly imposed a palpable burden on speech, *objectively* chilling citizens from uttering the arguably proscribed speech. To be sure, when a law does *not* impose any penalties on speech, one cannot manufacture a justiciable case by self-censoring. But

that doctrine has never been applied to a law like Ohio's that, on its face, criminalizes speech.

Fourth, the OEC enforcement regime makes the threat of prosecution *more* credible, not less. Under the statute, *any* politically motivated citizen may file a costless complaint and trigger proceedings. Even in the typical case, where only politically accountable prosecutors may enforce the law, courts recognize standing: The norm is that prosecutors will faithfully execute the laws and, anyway, the First Amendment "does not leave us at the mercy of *noblesse oblige*," *United States v. Stevens*, 559 U.S. 460, 480 (2010). *A fortiori*, there is standing where, as here, the enforcement threat is multiplied because the power to commence proceedings is given to every politically motivated citizen. Relatedly, while the OEC cannot impose criminal penalties, its enforcement actions and probable-cause findings independently burden speech in many other respects, and presage criminal enforcement by prosecutors. (And there is certainly no reason to presume that prosecutors will not prosecute speech that the statutorily designated expert agency has concluded violates the law.)

Fifth, there is no merit to the suggestion that petitioners were not actually "chilled" by the Ohio law and the OEC enforcement effort. SBA continued to spread its message only while OEC charges were pending against it; after they were dismissed, nobody disputed that it was chilled from repetition. And COAST indisputably refrained from speaking due to fear of facing SBA's fate (or worse).

Sixth, for the same reasons that the Sixth Circuit erred in evaluating the "credible threat" inquiry, it also misapplied the prudential ripeness factors.

III. The Sixth Circuit's wrongheaded approach has profoundly impaired constitutional rights, shutting down numerous challenges to all manner of speech codes and chilling an unknowable quantity of speech. In this case, the Sixth Circuit's restrictive rulings have assured perpetuation of a blatantly unlawful regime under which bureaucrats are the supreme fact-checkers for every political campaign—a regime that has, predictably, been routinely abused. All that political opponents need do, as they have routinely done in Ohio, is complain about controversial speech and obtain politically valuable "probable cause" findings *before* the election, and then drop the complaints *after* the election, once the damage has been done and the speech can no longer influence electoral decisions. The statute is thereby shielded from any judicial review—and will continue to be, absent correction by this Court.

ARGUMENT

I. PETITIONERS CLEARLY FACE A "CREDIBLE THREAT OF PROSECUTION" UNDER OHIO'S CRIMINAL FALSE-STATEMENT LAW.

There is no dispute that a speaker may pursue a pre-enforcement First Amendment challenge to a speech-proscribing law if he faces a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Speakers should not have to risk criminal penalties to participate in the marketplace of ideas, particularly the political marketplace. Pre-enforcement review is thus required to eliminate the prosecutorial threat that would inevitably cause all but the most courageous speakers to remain silent—which, in turn, would render freedom of speech illusory.

In view of that rationale, and as this Court's cases all confirm, the "credible threat" test is not especially demanding. It does not require a *particularized* threat or *undisputedly* unlawful speech, much less a prior *conviction*. The fact that a speech-proscribing law is on the books and has not been disavowed by authorities is enough to allow a challenge by any speaker whose intended speech arguably falls within the law's scope.

That standard is more than satisfied in this case. Petitioners' intended speech was *in fact* subjected to enforcement proceedings during the 2010 elections, and the Commission—charged with adjudicating alleged violations of the false-statement law and referring violations to prosecutors—actually declared that there was probable cause that engaging in the speech was a criminal offense. The threat faced by petitioners here is therefore well beyond "credible."

A. A "Credible Threat" Of Prosecution Exists If A Speaker's Intended Speech Is Arguably Proscribed By A Law On The Books.

This Court's justiciability jurisprudence clearly holds that pre-enforcement review is proper when a plaintiff would risk potential penalties under a law that the government has not disavowed. Particularly in the First Amendment context, any contrary rule would impose an obvious burden on basic freedoms.

1. To challenge a statute on a pre-enforcement basis, a plaintiff must "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298. Otherwise there would be no "case or controversy" within the meaning of Article III of the Constitution. Yet one "does not have to await the

consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Thus, in the context of a challenge to a criminal law, "it is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"). "[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) (emphasis omitted).

Accordingly, such a pre-enforcement challenge is justiciable if "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298. And the standard for proving existence of a "credible threat" under *Babbitt* is not rigorous or demanding. To be sure, pre-enforcement review would not be proper if a plaintiff's supposed fear of prosecution were merely "imaginary." *Younger*, 401 U.S. at 42. But the circumstances in which this Court has found a credible threat—even in cases involving less-protected commercial or sexually explicit speech—illustrate that the prerequisites are minimal, especially when core political speech is implicated.

Babbitt itself concerned an Arizona state law prohibiting unions from inducing consumers, via "dishonest, untruthful, and deceptive publicity," to refrain from buying certain products. 442 U.S. at 301. Although the provision "ha[d] not yet been applied," this Court found a "credible threat." *Id.* at 298. The plaintiff "actively engaged in consumer publicity campaigns in the past" and "alleged ... an intention to continue to engage in boycott activities." *Id.* at 301. "Although [it] d[id] not plan to propagate untruths," the union could still pursue its challenge, because "erroneous statement is inevitable" and so the union would be forced to "curtail [its] consumer appeals" due to fear of prosecution for "inaccuracies inadvertently uttered." *Id.* (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964)). Critically, to show reasonable fear of prosecution, it sufficed that "the State has not disavowed any intention of invoking the criminal penalty provision" and so the union was "not without some reason in fearing prosecution for violation of the ban." *Id.* at 302.

The Court reaffirmed *Babbitt* in *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988), involving a state law restricting display of sexually explicit materials. This Court was "not troubled by the pre-enforcement nature of this suit": the State had "not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise." *Id.* at 393. The plaintiffs thus had "an actual and well-founded fear that the law will be enforced against them," notwithstanding that the plaintiffs had brought their challenge before the statute even took effect. *Id.* And although it was not clear whether the statute actually applied to the plaintiffs' proposed conduct, that did not matter; it

sufficed, this Court ruled, that "if [the plaintiffs'] interpretation of the statute is correct, [they] will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392.

More recent decisions are to the same effect. In *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), this Court allowed "preenforcement review" of criminal provisions barring material support to terrorist groups, because "[t]he Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do." *Id.* at 2717. Citing *Babbitt*, the Court found that the absence of countervailing evidence was sufficient to create a "credible threat of prosecution." *Id.*

As these decisions confirm, if a plaintiff alleges an intent to engage in conduct that *arguably* violates a statute, and the government does not *disavow* enforcement of that statute, that is enough to presume a credible threat of prosecution.

2. Faithfully applying these precedents, all Circuits to reach the issue—except the Sixth—have likewise presumed a credible threat of prosecution if a plaintiff's intended speech arguably runs afoul of a speech prohibition, with that presumption subject to rebuttal only if the law has fallen into disuse or the government has made a firm commitment not to enforce it. *See, e.g.*, *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996) ("[A] pre-enforcement facial challenge to a statute's constitutionality is entirely appropriate unless the state can convincingly demonstrate that the statute is moribund or that it simply will not be enforced."); *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31-32 (1st Cir. 1999) (allowing pre-

enforcement review where law, although never enforced, had not "fallen into desuetude," nor had state "disavowed" it); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) (holding that "evidentiary bar that must be met [to show credible threat] is extremely low," requiring "long institutional history of disuse"); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (allowing review where, under "reasonable enough" construction of statute, plaintiff "may legitimately fear that it will face enforcement of the statute by the State"); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999) (allowing challenge where prosecutors expressed no "intention of refraining from prosecuting"); *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998) (holding that "a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute"); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) ("A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute."); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485-86 (8th Cir. 2006) (allowing review where plaintiffs had not "been threatened ... with prosecution," because statute was not "dormant" and state had "not disavowed" it); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that review is proper "if the plaintiff's intended speech arguably falls within the statute's reach"); *Az. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006-07 (9th Cir. 2003)

(finding credible threat where "Arizona has not suggested that the legislation will not be enforced ... nor has [it] fallen into desuetude"); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (allowing pre-enforcement suit despite lack of "any present danger of an enforcement proceeding," because one member of deadlocked agency could always change his mind).

3. While the foregoing principles apply to all constitutional rights, they have special importance in the free speech context. That is, this Court does not require those who wish to exercise their Second Amendment rights, abortion rights, or property rights, to risk suffering criminal penalties in order to obtain review either. *See District of Columbia v. Heller*, 554 U.S. 570, 575-76 (2008) (allowing pre-enforcement challenge to registration requirement for handgun); *Doe*, 410 U.S. at 188 (in abortion challenge, "physician-appellants ... should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Ex parte Young*, 209 U.S. 123, 145-46 (1908) (holding that company could not be required, "in order to test the validity" of statute, to run risk of "fines and penalties being imposed"). But the considerations that justify pre-enforcement review are particularly compelling in the First Amendment context.

As this Court has warned, "speakers may self-censor rather than risk the perils of trial." *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004). As such, "[t]here is a potential for extraordinary harm and a serious chill upon protected speech." *Id.* at 671. The chill caused by self-censorship, importantly, affects not only the putative speaker, but also the many

people who would otherwise be *listening* to that speech—and so taints, especially in the political context, the entire democratic process. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("[F]ree expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser"); *N.Y. Times*, 376 U.S. at 279 (noting that self-censorship "dampens the vigor and limits the variety of public debate").

That is why this Court's First Amendment jurisprudence has so strongly condemned statutes that tend to "chill" protected speech by inducing fear of government penalties. *See, e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971) (plurality op.) (invalidating statute that "would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate"); *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 759 (1988) (condemning unbridled licensing schemes as causing "self-censorship by speakers in order to avoid being denied a license"); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (describing "vice" of statute as inducing speakers to "steer far wider of the unlawful zone"

due to inherent risk that "legitimate utterance will be penalized"). Of course, if the risk of "chill" is enough to invalidate a statute *on the merits*, then it is *a fortiori* sufficient to allow the speaker to seek preemptive review. *Am. Booksellers*, 484 U.S. at 393 (allowing pre-enforcement review because "alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"). *Cf. Dombrowski*, 380 U.S. at 487 (noting that Court has allowed overbreadth challenges because, "[i]f the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation").

Thus, while it may be appropriate to require a slightly higher quantum of evidence to prove a credible threat of prosecution under laws implicating *other* constitutional rights, the threshold must be very low in First Amendment cases. *See Seegars v. Gonzales*, 396 F.3d 1248, 1252, 1253 (D.C. Cir. 2005) (noting that, while test may be more demanding for laws "not burdening expressive rights," it suffices in First Amendment cases that "the law is generally enforced"). Any other approach would, as explained, invite the very "chill" that this Court's First Amendment jurisprudence condemns.

4. In short, once the government enacts a law that limits speech, there is a tangible controversy between the state and any speaker whose intended speech arguably violates that law. Federal courts therefore plainly have the Article III power to adjudicate whether that burden is facially unconstitutional before the government *exacerbates*

that injury and burden by seeking to *imprison* or *fine* the speaker. That is because threatened enforcement, not just actual conviction, cognizably burdens the citizenry's right to speak and because a justiciability rule that required conviction first would allow the state to burden speech without judicial recourse, by silencing the vast majority of speakers whose speech is deterred by the threats.

Imposing the costs and burdens of defending against government enforcement efforts as an entry barrier to participate in the marketplace of ideas thus creates a tangible speech burden *now,* not merely a hypothetical, contingent speech burden in the future. Obviously, a law requiring citizens to pay $1 before they could publicly comment on electoral issues or candidates for office would be immediately justiciable (and promptly invalidated). Since the costs of defending against government enforcement are exponentially larger than $1, and the potential further burden of imprisonment deters even those who can readily absorb such defense costs, it is quite clear that a credible threat of prosecution gives rise to an immediate First Amendment controversy.

Finally, it is important to note that such threats of prosecution infringe speech to a greater extent when the relevant statute imposes a broad or ambiguous speech restriction, rather than a precisely defined one. By definition, such ambiguous, open-ended statutes arguably reach more speech than narrow, precisely crafted prohibitions and so *deter* more speech, since the speaker's rights are unclear and subject to the broad enforcement discretion of potentially politically motivated officials. *See, e.g.*, *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (vague

statutes that "abut upon sensitive areas of basic First Amendment freedoms" are highly troubling as they cause individuals to "restric[t] their conduct to that which is unquestionably safe").

Accordingly, it is quite clear that speakers who intend to engage in speech arguably prohibited by a statute, particularly a statute imposing an open-ended restriction, have standing to challenge the law as facially unconstitutional unless prosecutors have wholly foreclosed the possibility of any enforcement.

B. Petitioners Clearly Satisfied That Standard, Given The Probable-Cause Finding Rendered As To Their Intended Speech.

There can be no serious question that, given the law described above, SBA and COAST face a credible threat of prosecution under Ohio's false-statement law if they repeat their criticism of those who voted for the Affordable Care Act (as they wish to do).

When SBA and COAST filed their suits, SBA was facing *actual* enforcement proceedings for its speech critical of Driehaus. Thus, if analyzed at the time of the complaints' filing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992), it would be preposterous to hold that petitioners faced no threat of enforcement *even as enforcement was ongoing*.

And, of course, the OEC panel found in that proceeding that there was probable cause to believe that SBA's speech had violated the false-statement law. Pet.App.4a. So if measured at the time that the district court resumed proceedings after the dismissal of the OEC proceeding (or at any other time thereafter), that "probable cause" finding made very clear to SBA and COAST that repeating their message would likely subject them to similar

enforcement actions. And, if any doubt remained, it was resolved by the district court's own holding, in the related defamation action, that SBA's statements were factually false. *See Susan B. Anthony List*, 805 F. Supp. 2d at 435-36. As incredible as that holding was, it would inevitably be invoked by complainants in the future to show that SBA or COAST "recklessly disregarded" the "falsity" of their interpretation of the ACA, because they repeated their message even after a neutral federal court had said it was untrue.

Petitioners' evidence of a "credible threat" thus far exceeds that in *Babbitt*, *American Booksellers*, and *Humanitarian Law Project*. In none of those cases had the law previously been enforced against the *same* speech. Indeed, in *Babbitt* the law "ha[d] not yet been applied" at all, 442 U.S. at 302; in *American Booksellers*, suit was filed even "before the statute became effective," 484 U.S. at 392. Nor was there *affirmative* evidence in any of the cases that enforcement authorities would view the plaintiffs' conduct as violating the laws. In *Humanitarian Law Project*, this Court cited only the *lack* of any claim that the Government would *not* prosecute. 130 S. Ct. at 2717. Likewise, in *American Booksellers*, the State offered a narrow construction of the statute, but this Court still found a justiciable controversy because the State "has not suggested that the newly enacted law will *not* be enforced." 484 U.S. at 393 (emphasis added). And in *Babbitt* the plaintiff did not even intend to violate the law, merely alleging that, because errors are "inevitable," it would self-censor out of fear of "inadvertently" doing so. 442 U.S. at 301. By contrast, the OEC's probable-cause finding offered as clear a threat as can be imagined—absent actual conviction—of the likely outcome of

petitioners' intended speech. This past enforcement is icing on the justiciability cake.

As such, had this case arisen in any other Circuit, the court would have applied the ordinary presumption that, if a statute is not "moribund" (as the false-statement law clearly is not), and the State has not "demonstrate[d] that [it] ... will not be enforced" (as Ohio clearly has not), then a credible threat exists. *N.H. Right to Life*, 99 F.3d at 15-16.

Indeed, *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), addressed a challenge to Minnesota's materially identical false-statement law. The plaintiff was a group opposed to a school-funding ballot initiative; a school official told the media that the school district was "investigating" the group for spreading "false" information about the initiative. *Id.* at 626. The Eighth Circuit allowed the challenge, explaining that, "[t]o establish injury in fact ..., a plaintiff need not have been actually prosecuted or threatened with prosecution." *Id.* at 627. "Rather, the plaintiff needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute." *Id.* Although the law had been "infrequent[ly]" enforced, "only in extreme cases approaching desuetude" may the lack of enforcement "undermine the reasonableness of chill." *Id.* at 628.

In short, ordinary justiciability standards would clearly have allowed petitioners to challenge the Ohio statute here—not forced them to a choice between self-censorship and possible prosecution.

C. The Other Ripeness Factors Are Also Clearly Satisfied Here.

While the above addresses Article III ripeness (which here is the same as Article III standing), it is equally clear that SBA and COAST satisfy this Court's "prudential considerations" for determining whether a case is ripe for review. *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 81 (1978). Those factors require the Court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001).

First, petitioners' claims are undeniably fit for decision. Because SBA and COAST contend that the Ohio false-statement law is invalid on its face, "[t]he issue presented in this case is purely legal, and will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). Either the Constitution allows Ohio to criminalize "knowingly false" representations made during political campaigns, or it does not (and this Court's recent jurisprudence provides good reason to believe the latter). Resolution of that First Amendment question has nothing to do with the "truth" of the specific statements made by SBA, COAST, or anyone else.[1] And even if some factual record *were* necessary to resolve this purely legal question, the prior OEC proceedings against SBA provide a ready demonstration of how the false-

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[1] Moreover, the "truth" of petitioners' statements here—though irrelevant to the constitutional issue—is *itself* a pure question of law, since its "truth" turns on interpreting the ACA.

statement law actually operates. Denying review to allow for any further factual development "would not ... significantly advance [a court's] ability to deal with the legal issues presented nor aid [a court] in their resolution." *Duke Power Co.*, 438 U.S. at 82; *see also, e.g.*, *Whitman*, 531 U.S. at 479 ("The question before us here is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented.'" (citation omitted)); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (confirming that where issue is even "predominantly legal," "resolution of [that] issue need not await [further] development").

Second, denying prompt judicial review would impose a substantial, undeniable hardship on SBA and COAST. If the Ohio statute is insulated from pre-enforcement review, petitioners must choose between engaging in core expressive activity on matters of public concern and avoiding the threat of costly, inquisitorial OEC proceedings and even criminal prosecution. That directly contradicts this Court's longstanding refusal to place plaintiffs "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [they] believe[] to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462.

Conversely, Ohio suffers no hardship in defending the Act's constitutionality before delving into a contested OEC proceeding about the "truth" of petitioners' statements and their "actual malice." To the contrary, it is in the State's interest to promptly know whether its regime is facially unconstitutional,

so it can save resources in implementing the invalid regime (if it loses on the merits) or remove the cloud over the law (if it prevails).

In short, because the courts "will be in no better position later than [they] are now" to consider SBA and COAST's claims, *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 145 (1974), there is simply no reason—let alone a good one—for allowing this material hardship on speech to persist. This case is plainly ripe for judicial review.

II. THE SIXTH CIRCUIT'S ARGUMENTS TO THE CONTRARY ARE FUNDAMENTALLY AT WAR WITH BASIC FIRST AMENDMENT VALUES.

In the decision below, the Sixth Circuit offered an assortment of reasons for why pre-enforcement review should not be allowed. Those reasons, which the Sixth Circuit has also invoked in other cases, fundamentally misunderstand the injuries caused by speech-suppressive laws. They result in a regime under which a plaintiff must *admit* that his speech would violate the law, and prove that he would *almost certainly* be *successfully* convicted, in order to bring a constitutional challenge to that law. That is plainly untenable. This Court has never required a plaintiff to show certainty, or a particularized threat, that *he* would be prosecuted; or that authorities *already* found his speech unlawful; or that he *agreed* that his speech was proscribed. To the contrary, First Amendment jurisprudence confirms that those showings are both unnecessary for justiciability and irreconcilable with basic free speech principles. It is, rather, the threat of facing enforcement proceedings and potential criminal penalties that chills speech and constitutes Article III injury.

A. The *Speaker's* Position On Whether His Speech Violates The Law Is Irrelevant.

The Sixth Circuit held that petitioners could not "establis[h] ripeness" because they would "not say that [they] pla[n] to lie or recklessly disregard the veracity of [their] speech." Pet.App.15a. Admitting guilt is a prerequisite that the Sixth Circuit has also imposed in other pre-enforcement First Amendment challenges. *Fieger*, 553 F.3d at 965 (plaintiffs did not allege unlawful intent "to make vulgar, crude, or personally abusive remarks"); *Norton*, 298 F.3d at 554 (noting that "plaintiffs have professed an intention to comply with the" statute).

1. Subjective inquiry into whether the *speaker* believes his intended speech would violate the law, however, simply has nothing to do with the credible-threat test. The relevant question, under that test, is whether the speaker reasonably fears enforcement of the law against him, and that obviously turns on what *enforcement authorities* think. Courts thus routinely look to what enforcement authorities have said on the question whether the intended speech violates the law—but never (at least outside the Sixth Circuit) to what the *speaker* may think about that. *See, e.g.*, *Am. Booksellers*, 484 U.S. at 393 (citing State's lack of disavowal of prosecution); *Humanitarian Law Project*, 130 S. Ct. at 2717 (same); *Lopez v. Candaele*, 630 F.3d 775, 786-90 (9th Cir. 2010) (dismissing where "[n]o [school] official" suggested that sexual harassment policy would apply to intended speech); *PETA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002) (dismissing where defendants agreed they had "misinterpreted" law as proscribing the conduct at issue); *Am. Library Ass'n*

v. Barr, 956 F.2d 1178, 1192-93 (D.C. Cir. 1992) (question is "how likely it is that the government will attempt to" enforce statute against plaintiffs).

As the Eighth Circuit thus explained in *281 Care*, since determining truth "often proves difficult" in "the political-speech arena," plaintiffs' "reasonable worry that state officials ... will interpret [their] actions as violating the [false-statement] statute" was enough, even though they (like petitioners here) did not allege an intent to lie. 638 F.3d at 629-30.

Here, the Commission *already found* that petitioners' speech is probably criminal, providing "strong evidence" of a "credible threat," *Lopez*, 630 F.3d at 786-87, and making petitioners' fears even more reasonable than those of the speakers in *281 Care Committee*. Indeed, a complainant in a future OEC action would surely invoke the prior probable-cause finding to prove that SBA *knowingly* lied, by repeating its message notwithstanding that finding. Because petitioners' belief in the truth of their own speech does not remotely reduce the chance that a complainant would pursue enforcement, or the chance that the OEC would again find probable cause, or the chance that a prosecutor would file charges, it makes no sense for the ripeness inquiry to consider that belief—much less to turn on it.

2. Indeed, it would be ironically perverse to exclude from the courthouse only those speakers who believe that they are engaging in *truthful* speech. The reason why laws like Ohio's are constitutionally deficient is precisely because of their chilling effect *on truthful speech*. *See Alvarez*, 132 S. Ct. at 2548 (plurality op.) ("The mere potential for the exercise of that power [to prohibit false speech] casts a chill"

that the "First Amendment cannot permit."); *id.* at 2553 (Breyer, J.) (proscribing false speech "can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart"); *id.* at 2564 (Alito, J.) (agreeing that, in the political context, "any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech"). Thus, the Sixth Circuit's approach excludes as plaintiffs the precise speakers that the First Amendment is supposed to protect. Petitioners' objective, reasonable fear of enforcement and the ensuing self-censorship of their own truthful speech makes them the *ideal* plaintiffs to vindicate the constitutional values at stake.

Moreover, the decision below also shields from review precisely the laws that are most offensive to the Constitution. The more vague, open-ended, or discretionary the speech-proscribing law, the more difficult it is to determine whether intended speech violates the law—and therefore the more difficult for a plaintiff to aver that it does. But as noted, those laws are also the *most* constitutionally problematic. Their malleable nature vests the enforcer with broad discretion to both interpret the statutory scope and choose the citizens to be prosecuted. Such unfettered discretion is always subject to potential abuse, especially in the electoral context. Relatedly, it chills more speech than a bright-line prohibition because speakers at the margins will be deterred from arguably crossing the ill-defined line. *See Baggett*, 377 U.S. at 372 (vague statutes that "abut upon sensitive areas of basic First Amendment freedoms" are troubling as they cause individuals to "restric[t] their conduct to that which is unquestionably safe");

Lakewood, 486 U.S. at 757 ("[T]he mere existence of the licensor's unfettered discretion ... intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."); *Schirmer v. Nagode*, 621 F.3d 581, 586-87 (7th Cir. 2010) ("[U]ncertainty is particularly problematic in the realm of free speech, given the danger that vital protected speech will be chilled.").

For example, *Playboy*'s publisher would not believe that the magazine violates a law barring "offensive depictions of women" and *The New Republic*'s publisher would not think it violated a law prohibiting "unsubstantiated criticism" of public officials. Yet, although such laws are plainly unconstitutional precisely because they impose amorphous, overbroad speech restrictions, the Sixth Circuit's perverse test would immunize them from challenge until after the magazines were prosecuted.

In other words, the Sixth Circuit's "admission of guilt" prerequisite is exactly backwards. On its view, *truthful* speakers who are chilled by *vague* statutes of *uncertain* scope would be precluded from bringing pre-enforcement challenges, even though those are the speakers for whom, and the statutes for which, such anticipatory review is the *most* critical.

Here, the Ohio law proscribes "false" political speech, with liability thus turning on the impossibly open-ended concept of political "truth." Candidates routinely accuse one another of "lying," but—as this case illustrates so well—these are invariably debates over characterization or context, not black-or-white facts. Thus, as this case again so vividly illustrates, the potential for politically motivated abuse is great. *See also infra* Part III.

3. As if that were not bad enough, the Sixth Circuit's insistence on a preemptive and untrue *confession* of criminal intent *itself* greatly chills speech. Announcing oneself to be a liar is generally not an advisable way to gain credibility in politics. Indeed, the Sixth Circuit's demand for preemptive confession would grant the subject of the criticism at issue a complete response: "My opponent has already *admitted* in federal court that his attacks are false!" Given the political context of the false-statement statute, the Sixth Circuit's rule—you may get into court if you admit that you are a liar—only *exacerbates* the law's chilling effect.

Perhaps even worse, requiring a preemptive *admission* of knowing falsity as a prerequisite to opening the federal courthouse doors effectively coerces plaintiffs to confess to a crime. Since such a confession would, as a practical matter, effectively compel a prosecutor to charge the admitted violator, the stakes for *pre-enforcement* review would be all but indistinguishable from raising the Constitution as a *defense* to a prosecution—*i.e.*, the plaintiff will either prevail on the challenge or risk imprisonment. This is, of course, precisely the dilemma sought to be avoided by pre-enforcement review. Even if such coerced self-incrimination is permissible under the Fifth Amendment, it cannot possibly be reasonably imposed as a threshold standing requirement.[2]

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[2] While a speaker who has not already uttered the "false" speech could avoid prison, these disputes inevitably occur after the speech has been uttered at least once, when the political opponent threatens the speaker or media outlet involved. And if a challenge were filed *before* such a dispute, the Sixth Circuit would find the threat of prosecution speculative. *Infra* Part II.B.

4. The Sixth Circuit worried that, without a confession of criminal intent, petitioners' fear would amount to fear "of a false prosecution." Pet.App.15a. Maybe so, in that petitioners believe their speech is truthful. But that does not mean that their fear is not *credible*; it clearly is, given the OEC's past finding. And the chilling effects caused by the risks of "false" prosecutions, "false" convictions, and "false" liability awards have long been sufficient even to *invalidate* laws under the First Amendment. *See, e.g.*, *Speiser*, 357 U.S. at 526 (citing "possibility of mistaken factfinding"); *Baggett*, 377 U.S. at 374 ("Even if it can be said that a conviction ... would not be sustained, the possibility of a prosecution cannot be gainsaid."); *N.Y. Times*, 376 U.S. at 279 (citing chill "even though [criticism] is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court"). Such risks are thus *a fortiori* sufficient for *standing*.

B. No "Final Determination" That The Intended Speech Is Illegal Is Needed In Order To Create A Credible Threat Of Prosecution.

The Sixth Circuit held that the past enforcement of the false-statement law against SBA was not evidence supporting any fear of future enforcement, but merely a "prior injury," "not enough to establish prospective harm." Pet.App.9a. To create a credible threat of future prosecution, the court reasoned, the OEC would have to have "*found* that [SBA] *violated* [the] law." Pet.App.10a (emphases added); *see also* Pet.App.11a (noting that probable-cause finding "is neither a 'definitive statement of position,' nor a 'definitive ruling or regulation'" (quoting *FTC v. Standard Oil of Cal.*, 449 U.S. 232, 241-42 (1980))).

In other words, the Sixth Circuit requires the speaker to prove to a *near-certainty* that he would be *successfully* prosecuted. That, in practice, means that a speaker may pursue a "*pre*-enforcement" challenge only *post*-enforcement, because authorities do not issue preemptive "definitive" statements about whether conduct is unlawful. Again, this is a rule that the Sixth Circuit has applied repeatedly. *E.g.*, *Fieger*, 553 F.3d at 967 (attorney must "present evidence" that "Michigan Supreme Court would ... impose ... sanctions" under "civility" rule); *Morrison*, 521 F.3d at 610 ("The record is silent as to whether the school district ... would have punished Morrison for protected speech in violation of its policy."). *Cf. Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995) (allowing challenge only *after* OEC found speaker guilty under false-statement law).

1. The obvious defect in the Sixth Circuit's analysis is that a "credible threat" of prosecution may clearly exist even absent a "definitive statement of position" by the enforcement authorities as to the illegality of the intended speech. Pet.App.11a. To be "credible," a threat need not be "definitive." Even if application of the statute to the plaintiff is *uncertain*, that *uncertainty* can cause speakers to self-censor. "[U]ncertainty is particularly problematic in the realm of free speech, given the danger that vital protected speech will be chilled." *Schirmer*, 621 F.3d at 587. Indeed, there is always *some* uncertainty, because prosecutors do not pursue *all* violations. Just as that discretion does not bar suit—the First Amendment "does not leave us at the mercy of *noblesse oblige*," *Stevens*, 559 U.S. at 480—doubts over whether authorities would view conduct as prohibited do not defeat standing either.

More important, the only practical way to obtain the "definitive statement of position" the Sixth Circuit demands would be to engage in the conduct and see what happens. If the speaker is convicted, then he has proved the point—but can no longer seek "pre-enforcement" review to foreclose a prosecution. It is thus not a *credible threat* that the Sixth Circuit requires, but its *realization*. Yet this runs headlong into this Court's long-established rule that one need not "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel*, 415 U.S. at 459; *see also Dombrowski*, 380 U.S. at 487 (review need not await one "hardy enough to risk criminal prosecution").

This is why this Court has never required any "definitive" statement by prosecutors that they will prosecute, relying instead on the *absence* of *disavowing* prosecution. *Compare Am. Booksellers*, 484 U.S. at 393 (citing non-disavowal), *with Morrison*, 521 F.3d at 610 (dismissing where "record is silent" on whether school would pursue charges). And this is why the other Circuits allow review so long as intended speech is "arguably" proscribed, not "definitively" so. *N.H. Right to Life*, 99 F.3d at 18 ("arguably prohibited"); *Majors*, 317 F.3d at 721 ("arguably covers"); *Cal. Pro-Life Council*, 328 F.3d at 1095 ("arguably falls within the statute's reach").

2. The case that the Sixth Circuit cited for the "definitive statement of position" standard, *FTC v. Standard Oil*, concerned an agency's issuance of an administrative complaint and addressed whether it constituted "final agency action" subject to review in federal court under the Administrative Procedure

Act prior to the termination of the administrative adjudication. 449 U.S. at 233. But neither the APA's nor *Standard Oil*'s discussion of what constitutes "final agency action" says anything about whether a pre-enforcement First Amendment suit is appropriate because, again, such challenges are permissibly commenced based on "credible *threats* of *prosecution*," not "*final decisions*."

More specifically, *Standard Oil* explained that immediate review *would* be appropriate if the agency action had a "direct and immediate effect" on the plaintiff's primary conduct, *e.g.*, by inducing it to change its behavior to avoid potential sanctions. *See id.* at 239, 242 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). But the agency complaint only challenged *past* conduct, and thus had no "legal or practical effect, except to impose ... the burden of responding to the charges." *Id.* at 242.

Standard Oil has no relevance here. Not only did it not present a First Amendment challenge to a speech-suppressive law, but it did not challenge *any* conduct-prohibiting rule or regulation. Nor was it an attempt to obtain "pre-enforcement" review; rather, it was an effort to bypass administrative review of purely *past* conduct. It thus presented none of the considerations that have motivated this Court's pre-enforcement justiciability jurisprudence. In APA cases that *do* present those considerations, *i.e.*, where agency action "requires an immediate and significant change in the plaintiffs' conduct ... with serious penalties attached to noncompliance," *Abbott Labs*, 387 U.S. at 153, pre-enforcement review is permissible; plaintiffs need not expose themselves to such penalties in order to obtain judicial relief.

3. Below, the Sixth Circuit also discounted the prior "probable-cause" proceedings against SBA, on the theory that "past" actions have no significance for justiciability. Pet.App.10a. Quite obviously, though, past enforcement of a law that remains on the books *is* an extraordinarily good predictor of future enforcement for similar speech. This bears no similarity to *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), where a police officer's use of a chokehold against the plaintiff in one random encounter did not suggest that future such encounters were likely for that particular plaintiff. *See id.* at 105-06.

More important, the Sixth Circuit's bizarre regime creates the worst of all worlds for core political speech: enforcement proceedings to chill such speech during campaigns, cessation of such burdensome enforcement once the election-related speech is valueless, and repetition of the speech-deterring enforcement during the next election cycle, without any judicial review in the interim.

Such a regime of enforcement that evades review is clearly impermissible; it is well-established, even outside the speech context, that an agency's cessation of enforcement proceedings does not eliminate jurisdiction to challenge them. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," because otherwise defendant would be "free to return to his old ways."). To the contrary, it shifts the burden to the "party asserting mootness" to show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v.*

Laidlaw Envt'l Servs., Inc., 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). Yet instead of requiring the OEC to meet that test—which it plainly could not—the Sixth Circuit held that the voluntary cessation of the OEC proceedings shielded the *entire statute* from judicial review unless *petitioners* were able to prove that future prosecution was virtually certain, thereby directly authorizing the abusive tactic of initiating politically motivated proceedings during electoral campaigns and dropping them after. *See infra* Part III.

C. When A Law Proscribes Speech, The "Chill" That Results Is Not Merely "Subjective."

The Sixth Circuit's error appears to stem in part from confusion over the notion of "subjective chill." To warrant pre-enforcement review, the court said, speech must be "more than *subjectively* chilled." Pet.App.11a (quoting *Berry v. Schmitt*, 688 F.3d 290, 297 (6th Cir. 2012)) (emphasis added). And in other cases, the Sixth Circuit has similarly dismissed challenges by describing chill as merely "subjective." *E.g.*, *Morrison*, 521 F.3d at 609 (requiring evidence "to substantiate an otherwise-subjective allegation of chill"); *Fieger*, 553 F.3d at 965 (requiring plaintiff "to articulate something more than ... subjective 'chilling' of speech").

The critical point about "subjective chill" is that this Court has used that phrase only to describe supposed chill caused by state action *that does not directly proscribe or penalize speech.* In other words, the "chill" that concerns the Court is that caused by a credible threat of facing penalties or burdens under a law facially regulating speech. By contrast, where

someone's speech is *indisputably lawful*, but he is nonetheless subjectively self-censoring as a response to state action that does not actually penalize or threaten his speech, pre-enforcement review of that state action is not proper. Chill is thus "subjective" if the supposedly chilling law provides no authority for any adverse state action targeting the type of speech at issue. That doctrine is simply inapposite in this case, a traditional First Amendment challenge to a law that, directly and on its face, prohibits speech on pain of substantial criminal penalties.

The "subjective chill" doctrine originated in *Laird v. Tatum*, 408 U.S. 1 (1972). The plaintiff in that case alleged "that the exercise of his First Amendment rights [wa]s being chilled by the mere existence ... of a governmental investigative and data-gathering activity." *Id.* at 10. As the Court explained, its prior cases addressing "chilled" speech involved "governmental power [that] was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.* at 11. The Court thus distinguished cases in which the state was penalizing speech by restricting membership in the State Bar, *Baird v. State Bar of Az.*, 401 U.S. 1 (1971); discharging public employees, *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); or imposing heightened obligations on the receipt of propaganda materials through the mail, *Lamont v. Postmaster General*, 381 U.S. 301 (1965). However marginal some of those burdens on speech may have been, each of the plaintiffs was "in danger of sustaining a direct injury as the result of" the challenged state action. *Laird*, 408 U.S. at 12-13 (quoting *Ex parte*

Levitt, 302 U.S. 633, 634 (1937)). By contrast, the plaintiffs in *Laird* faced no legal repercussions from the challenged state data-gathering activities; the "chill" they alleged stemmed only from "speculative apprehensiveness that the Army may at some future date misuse the information in some way." *Id.* at 13. That sort of "chill," the Court ruled, is merely a "subjective" response to state action that does not create "specific present objective harm or a threat of specific future harm." *Id.* at 13-14.

Subsequent cases have invoked the "subjective" chill language only in analogous circumstances, *i.e.*, where the plaintiff was not even arguably subject to any direct restrictions or burdens on his speech. Thus, in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), this Court held that plaintiffs challenging a surveillance program did not establish standing based merely on "their fear of surveillance." *Id.* at 1152. Any chill was only subjective, because—as in *Laird*—it "resulted from a governmental policy that does not regulate, constrain, or compel any action on their part." *Id.* at 1153. *Accord United Presbyterian Church in the USA v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.) (invoking *Laird* to bar challenge to executive surveillance order that "issues no commands or prohibitions").

By contrast, in *Meese v. Keene*, 481 U.S. 465 (1987), where the plaintiff showed that his exhibition of films that the government labeled "propaganda" would "substantially harm his chances for reelection" and "adversely affect his reputation," this Court found that he had "demonstrated more than a 'subjective chill.'" *Id.* at 473-74. The critical difference was that the plaintiff in *Meese*, had he

proceeded with the speech, faced a tangible threat of concrete harm. That impending injury sufficed for standing, even though he self-censored to avoid it.

In this case, the "chill" suffered by petitioners is obviously not "subjective." Ohio's law "regulate[s]" and "constrain[s]" their speech, *Clapper*, 133 S. Ct. at 1153, and they face a "threat of specific future harm," *Laird*, 408 U.S. at 13-14—*viz.*, enforcement burdens and potential criminal penalties—if they violate it. *Babbitt* and *American Booksellers* govern here, not *Laird* and *Clapper*.

D. The Structure Of The OEC Regime Makes The Threat Of Enforcement Proceedings *More* Credible, Not Less Credible.

The Sixth Circuit also claimed that petitioners could not show a credible threat of prosecution due to certain features "peculiar to the [OEC's] statutory powers." Pet.App.12a. *First*, the OEC itself "cannot initiate proceedings, but instead must wait for someone to bring a complaint." *Id.* The court asked: "Who is likely to bring a complaint to set the wheels of the Commission in motion?" *Id.* Not Driehaus, it said, because he may not run for elective office again. Pet.App.14a. And while the statute allows "any" other citizen to file a complaint, OHIO REV. CODE § 3517.153(A), the Sixth Circuit found that notion overly speculative. Pet.App.12a. *Second*, the court noted that the OEC may, at most, "refer the matter to a prosecutor," but cannot directly impose criminal or other penalties for violation of the statute. Pet.App.4a. The Commission has contended that this feature forecloses review as well, because even if the OEC found a violation, prosecution would not inevitably result. (BIO 26, 31.)

1. Outside the OEC context, usually only a small group of prosecutors may bring charges. And whether they will do so is *always* "speculative" to some extent, given that only the prosecutors know for sure how they will exercise their discretion. But, because the only way to know for sure is through self-exposure to sanctions, the law presumes that the threat of prosecution is "credible" and allows pre-enforcement review, at least absent clear evidence that prosecutors will *not* pursue charges. *See, e.g.*, *Am. Booksellers*, 484 U.S. at 393; *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) (only "assurances from prosecutors that they do not intend to bring charges" defeat standing). Thus, justiciability law clearly does not bar review based on doubt over whether a prosecutor would enforce the law. *See Doe*, 410 U.S. at 208 (Burger, C.J., concurring) ("[N]o one in these circumstances should be placed in a posture of dependence on ... prosecutorial discretion."); *Baggett*, 377 U.S. at 373 ("Well-intentioned prosecutors ... do not neutralize the vice of a vague law."). *But see Fieger*, 553 F.3d at 967 (requiring proof that enforcing court "would, in its discretion, impose such sanctions" for violating civility code).

Here, as noted, the triggering of enforcement proceedings is not limited to government officials who are ethically obliged to eschew frivolous or biased enforcement, but can be done by a multitude of politically-motivated individuals. If anything, this makes it *easier* to establish a credible threat of enforcement action. Instead of just one or several prosecutors, *millions* of people may file complaints. They have every incentive to do so—and, unlike prosecutors, who face constraints of scarce resources and electoral accountability—no reason *not* to. In a

hard-fought political campaign, every marginal effort to diminish an opponent might make the difference between victory and a narrow loss. Hence the OEC "handles about 20 to 80 false statement complaints per year." *Ohio Elections Commission Gets First Twitter Complaint*, THE NEWS-HERALD (Oct. 29, 2011). By broadly allowing all citizens to serve as private attorneys-general to enforce its false statement-law, Ohio makes the enforcement threat in a particular case all the more credible. To be sure, exactly *who* would file a complaint in any given case is necessarily speculative, but that *someone* would do so is extremely likely—and the latter is what establishes a credible threat.

The Sixth Circuit focused on whether *Driehaus* was likely to bring another complaint to the OEC. Pet.App.14a. But petitioners indisputably intend to launch the same criticism against *other* candidates for office in Ohio who had supported the ACA and who continue to run in elections, for Congress and other elective offices. JA149 ("COAST desires to make the same or similar statements about other federal candidates who voted for ObamaCare, as well as about candidates in local or state elections who either voted to support or voiced support of ObamaCare."); JA122 ("SBA List intends to engage in substantially similar activity in the future."). Any citizen who supported those candidates could file a complaint (and would have motive to do so). *See* Pet.App.12a (quoting SBA's statement at oral argument that any "citizen in Ohio who supports Obama" could file a complaint). Driehaus' particular circumstances are thus simply beside the point.

2. Nor does the two-stage enforcement scheme contemplated by the Ohio law somehow undermine the credibility of the threat faced by petitioners. To the contrary, Ohio's regime allows speakers to be not only criminally prosecuted, but also initially penalized through costly, burdensome enforcement actions by the OEC. This hardly creates *less* of an injury but, rather, imposes an *additional* one.

First, while an OEC enforcement proceeding is not an ordinary "prosecution," it is the first—and a necessary—step to traditional criminal prosecution. Prosecutors cannot charge violations of the false-statement law absent an OEC referral. OHIO REV. CODE § 3517.21(C). A "credible threat" of an OEC enforcement action thus necessarily gives rise to a "credible threat" of a subsequent prosecution, at least absent "assurances from prosecutors that they do not intend to bring charges." *D.L.S.*, 374 F.3d at 975. There have been no assurances or disavowals here, and there is simply no reason to believe prosecutors will not do their jobs when the expert agency—the OEC—has told them there has been a violation of the false-statement law (which, by statute, the OEC *must* do, OHIO REV. CODE § 3517.155(D)(2)).

Second, even if it were clear that prosecutors would *not* follow up on any OEC referral, or even if the Ohio statute did *not* allow criminal penalties to ever be imposed, the OEC's enforcement proceeding *itself* constitutes an impending injury sufficient for standing. To warrant pre-enforcement review of a law that burdens speech, "[t]he threatened state action need not necessarily be a prosecution." *Lopez*, 630 F.3d at 786. To the contrary, as noted in *Laird*, this Court has allowed challenges to laws restricting

bar membership, threatening discharge from public employment, and burdening receipt of certain mail. *See* 408 U.S. at 12-13 (citing *Baird*, 401 U.S. 1; *Keyishian*, 385 U.S. 589; and *Lamont*, 381 U.S. 301). And even the threat of an *unsuccessful* prosecution suffices for pre-enforcement review, in view of the burdens imposed on speakers by such proceedings. *Dombrowski*, 380 U.S. at 487 ("The chilling effect ... may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *Mangual*, 317 F.3d at 59 ("The plaintiff's credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that the reporter would be convicted."). This further proves that criminal penalties need not be likely for a ripe controversy to exist.

The financial, political, and disclosure burdens imposed by the OEC proceeding are, plainly, equally sufficient to constitute injury sufficient to warrant pre-enforcement judicial review. Being compelled to participate in the OEC process—to defend the truth of one's political speech before a panel of government bureaucrats—would present an independent burden on speech, even if the applicable criminal penalties were counterfactually taken off the table. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468 n.5 (2007) ("[L]itigation constitutes a severe burden on political speech."). Not only does defending such an action cost money, distract time and attention from pending campaigns, and impose heavy political costs, but the Commission has the power to issue subpoenas, order discovery, and seek contempt to enforce its orders. OHIO REV. CODE § 3517.153(B); OHIO ADMIN. CODE § 3517-1-11(B)(3). Indeed, Driehaus invoked such discovery to demand highly

confidential campaign communications among SBA, like-minded advocacy groups, and even Members of Congress, thus imposing a further chilling effect on core political speech and lobbying. JA183-95. And such discovery will *always* be sought, to determine the speaker's "knowledge" that the statement was "false." But as this Court has recognized, "compelled disclosure" by "groups engaged in advocacy" can impose "a restraint on freedom of association." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (agreeing that "compelled disclosure, in itself, can seriously infringe on privacy of association ... guaranteed by the First Amendment"). Since compelled disclosure of confidential campaign communications can, in some circumstances, *itself* violate the Constitution, *see John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2817-21 (2010), to threaten it surely constitutes an impending burden on speech sufficient to trigger the right to pre-enforcement review.

Finally, a finding by the OEC that one's speech is knowingly false (or "probably" so) imposes injury on the speaker even if prosecutors would, for whatever reason, decline to file criminal charges. For the state to publicly brand someone a "liar" is no small thing, especially in the electoral context. To a candidate, the stigma associated with that finding is a tangible harm that could mean the difference between victory or defeat. If being labeled a "propagand[ist']" by the state suffices for standing because it could "harm" the speaker's "chances for reelection," *Meese*, 481 U.S. at 473-74, then surely the same is true of being labeled a knowing liar. This is yet another reason why petitioners here have standing without regard to the likelihood of *criminal* prosecution.

E. The Suggestion That Petitioners Were Not in Fact Chilled Is Neither True Nor Relevant.

In discounting the threat that any speech would be chilled, the Sixth Circuit found that SBA was not actually "chilled" because it supposedly continued to express its message freely after Driehaus filed his OEC complaint. Pet.App.17a.

First, that is simply untrue. SBA did not self-censor while enforcement proceedings were *pending*, because it was already on the hook for its speech and repeating the same message would not subject it to any *more* prosecution. That is why it continued to run radio advertisements during the campaign. JA73. After the OEC dismissed the case, however, SBA did fear that repeating its message would expose it to additional costs and burdens, and so alleged. JA121-22. Those allegations are undisputed (and obvious, since many other candidates supporting the ACA ran in 2012 and will run in 2014). Moreover, there is no dispute that *COAST* was chilled by the Commission's probable-cause finding about its intended speech. JA148. The Sixth Circuit simply held that its chill was "speculative" because it had never been subjected to enforcement proceedings. Pet.App.18a; *see also* Pet.App.57a.

In any event, the law does not require that a speaker actually cease speaking in order to secure pre-enforcement review. A credible threat may exist whether or not the speaker chooses to run that risk on occasion. Free speech is burdened by such threats regardless of whether the speaker accepts those burdens because of a fervent desire to get his message out. As then-Judge Scalia explained in *United Presbyterian*, "some who have successfully

challenged governmental action on 'chilling effect' grounds have themselves demonstrably *not* suffered the harm of any chill, since they went ahead and violated the governmental proscription anyway." 738 F.2d at 1378-79. Standing analysis turns on the existence of the burden, not on whether the speaker acquiesces to, or defies, the unconstitutional threat.

This is particularly true because threatened prosecution can stifle speech regardless of whether the plaintiff is cowed into submission. Ohio's law applies not just to the political entity or candidate making a statement or paying for an advertisement, but to *anyone* who "[p]ost[s], publish[es], circulate[s], distribute[s], or otherwise disseminate[s]" the "false" statement. OHIO REV. CODE § 3517.21(B)(10). This encompasses media outlets, radio stations, billboard companies, and any others whom speakers might enlist or hire to distribute their message. And once the target of the criticism puts such a third-party on notice that he believes the statement to be false, that third-party is within the OEC's crosshairs and so could be "chilled" even if the speaker is not.

Here, for example, SBA was concretely harmed by the false-statement law even apart from the credible threat that *it* would face enforcement action: The billboard company with which it had contracted refused to post the disputed billboards as a direct consequence of Driehaus' threatened litigation under the Ohio law. JA26-27. The notion that SBA was unharmed by the statute is thus *doubly* wrong.

F. The Sixth Circuit's Warped "Credible Threat" Analysis Tainted Its Evaluation Of The Other Ripeness Factors.

The Sixth Circuit's misapprehension of the "credible threat" standard also infected its handling of the prudential ripeness considerations, resulting in a similarly flawed analysis. Specifically, the court held that SBA's case was not fit for review because "[t]he Commission has not found that SBA List violated the false-statement law" and "no prosecutor has taken any action upon any Commission referral." Pet.App.16a. And the court went on to conclude that SBA would not suffer hardship in the absence of review because it "has not demonstrated an objective fear of future enforcement." Pet.App.17a.

Of course, these conclusions are nothing more than a repackaging of the court's insistence that a speaker can show a "credible threat" of prosecution only by proving that a successful prosecution is virtually guaranteed. As explained, however, that is mistaken and misguided. *See supra* Part II.B. Had the panel taken this Court's "credible threat" cases seriously, the only conclusion that it could have drawn is that the case is entirely fit for review (both because SBA had already had a complaint filed against it for the speech in question *and* because petitioners' facial challenge raises a purely legal question), and that the denial of review imposes a substantial hardship on petitioners (in light of their well-established objective fear of prosecution for engaging in similar speech in the future).

III. THE SIXTH CIRCUIT'S APPROACH PROFOUNDLY IMPAIRS FREE SPEECH IN ITS MOST IMPORTANT CONTEXTS.

The effect of the Sixth Circuit's approach to pre-enforcement First Amendment challenges is to prevent even meritorious challenges to laws that suppress speech, resulting in self-censorship, chill, and degradation of political discourse—the very evils that the First Amendment is designed to combat.

Ohio's false-statement law is far from moribund; as noted, the OEC "handles about 20 to 80 false statement complaints per year." THE NEWS-HERALD, *supra*. The OEC has been asked to determine the "truth" or "falsity" of everything from whether a congresswoman's receipt of donations from a Turkish PAC constituted "blood money" given the Armenian genocide, *State Hears Schmidt Genocide Case*, CINCINNATI ENQUIRER, 2009 WLNR 16019649 (Aug. 14, 2009), to whether a school board "turned control of the district over to the union," Ray Crumbley, *Hearing Set on Complaint That School Levy Foes Violated Law*, COLUMBUS DISPATCH, 1992 WLNR 4914401 (May 16, 1992), to whether a city councilor had "a habit of telling voters one thing, then doing another," *Election Complaint Filed*, CLEVELAND PLAIN DEALER, 1997 WLNR 6374883 (Nov. 12, 1997), to whether a state senator had supported higher taxes by voting to put a proposed tax increase on the ballot, *State Elections Panel Chides Latta Campaign*, THE BLADE, 2007 WLNR 21915569 (Nov. 6, 2007). These examples, while ludicrous, paint an accurate picture of the types of claims that, in Ohio, are subject to OEC litigation, given the inherent malleability of "truth" in political advertising.

Indeed, the range of political claims that could be subjected to litigation under the Ohio law is virtually endless, underscoring the serious First Amendment concerns about the regime. A veritable industry of journalists purports to "fact check" claims by political candidates. In the 2012 Ohio Senate race, just for example, these sites concluded that (i) it was "false" for Republican candidate Josh Mandel to describe Senator Sherrod Brown as having cast the "deciding" vote for the Affordable Care Act, because although every vote was critical, his was not the *last* vote to be cast, *see* http://goo.gl/nm7RNX; (ii) it was "false" for Senator Brown to say that Mandel "would have voted 'no'" on the bailout for the auto industry, *see* http://goo.gl/z6geJU; and (iii) Mandel earned a "pants-on-fire" rating for criticizing Brown as "sid[ing] with Washington bureaucrats and fringe extremists in the attacks on our natural resources," *see* http://goo.gl/yh0vL0. Under the Ohio law, the targets of such routine political criticism could file OEC complaints against their critics and quite possibly obtain probable-cause findings. Also, of course, the speakers could file their own complaints after being "falsely" labeled "liars." And this endless cycle of point/counter-point on public policy is, apparently, to be adjudicated by bureaucrats and/or criminal courts in the heat of a time-sensitive election campaign. In our democracy, however, such debates are supposed to be "resolved" by voters. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that ... freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

Nor is this concern limited to Ohio. At least 15 other states have analogous statutes. ALASKA STAT. § 15.56.014; COLO. REV. STAT. § 1-13-109; FLA. STAT. ANN. § 104.271(2); LA. REV. STAT. ANN. § 18:1463; MASS. GEN. LAWS CH. 56, § 42; MICH. COMP. LAWS § 168.931; MINN. STAT. § 211B.06; MONT. CODE ANN. § 13-37-131; N.C. GEN. STAT. § 163-274(A)(8); N.D. CENT. CODE § 16.1-10-04; OR. REV. STAT. ANN. § 260.532(1); TENN. CODE ANN. § 2-19-142; UTAH CODE ANN. § 20A-11-1103; WISC. STAT. § 12.05; W. VA. CODE § 3-8-11.

Yet such laws, after *Alvarez*, are almost certainly unconstitutional. *All* the Justices there agreed that laws restricting false political statements would be subject to strict scrutiny. *Alvarez*, 132 S. Ct. at 2548 (plurality); *id.* at 2552 (Breyer, J., concurring in judgment); *id.* at 2564 (Alito, J., dissenting). Even the U.S. Solicitor General conceded that laws like Ohio's, generally proscribing false campaign speech, "are going to have a lot harder time getting through the Court's 'breathing space' analysis." Tr. of Oral Argument 18, *Alvarez*, 132 S. Ct. 2537 (No. 11-210). And Ohio's own Attorney General has filed an *amicus* brief attacking the law's constitutionality. *See* Amicus Br. of Ohio Atty. Gen. at 19-20, *COAST Candidates PAC v. Ohio Elections Comm'n*, No. 1:11-cv-775 (S.D. Ohio Feb. 10, 2012) (agreeing that "Ohio's generalized prohibitions on 'false statements' made in the course of a political campaign burden core, truthful speech protected by the First Amendment" and noting that the OEC "machinery has been used extensively by private actors to gain political advantage in circumstances where malicious falsity cannot ultimately be established").

Despite that broad consensus, the Sixth Circuit's holdings assure the indefinite perpetuation of this censorious regime. The court applies *Younger* to preclude review *while* enforcement proceedings are pending (as in this case). JA108 (finding SBA's allegation of chill "an insufficient basis to overcome *Younger* abstention"). And the Sixth Circuit's approach makes it impossible to sue *earlier* (since prosecution is "speculative") or *later* (since past enforcement proves nothing). *See Krikorian v. Ohio Elections Comm'n*, No. 10-CV-103, 2010 WL 4117556 (S.D. Ohio Oct. 19, 2010) (dismissing challenge even after OEC issued reprimand). So, if pre-enforcement review is not available, the *only* way to obtain federal review would be to subject oneself to prosecution and appeal to Ohio courts, hoping that this Court would grant certiorari from a final, affirmed conviction.

Not only does that regime ensure that untold volumes of political speech will be silenced—in the context where "the constitutional guarantee has its fullest and most urgent application," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)—but it fails to account for the abuse that has predictably become the norm. The Commission concedes on its website that campaigns "use the Commission as a part of their activities." *Ohio Elections Commission: History*, http://elc.ohio.gov/History.stm. Indeed, as in this case, complainants often drop their complaints once the election is over and the political damage has been done. *E.g.*, *Candidates for Judge's Seat Drop Complaints*, COLUMBUS DISPATCH, 2004 WLNR 21190313 (May 14, 2004); Jim Woods, *Complaint, Suit Over Election Ad Dropped*, COLUMBUS DISPATCH, 2001 WLNR 11914358 (Mar. 2, 2001); Michele Fuetsch, *Mayor Drops Complaint Against*

Council President, CLEVELAND PLAIN DEALER, 1998 WLNR 7134266 (July 31, 1998). That leaves no remedy for the injuries suffered by the speaker:

> The initial hearing alone can require the accused party to spend time and money preparing a defense. And savvy politicians know to make such complaints just before an election, so that the target of the complaint suffers bad publicity in the final days of the campaign, when it is too late for the complaint to be upheld or dismissed.

Speech Police, COLUMBUS DISPATCH, 2012 WLNR 5833464 (Mar. 19, 2012).

Being dragged before state officials or subjected to criminal prosecution are obviously burdens standing alone and, combined with the risk of criminal penalties, will greatly deter most speakers. The Sixth Circuit's approach thus guarantees that truthful speech will be substantially deterred. Indeed, the Commission affirmatively promotes this chill, boasting on its website that "campaigns and their consultants will continue to hone their messages in an attempt to work carefully around the Commission." *Ohio Elections Commission: History*, http://elc.ohio.gov/History.stm.

The Catch-22 created by the Sixth Circuit's approach essentially immunizes from judicial review Ohio's unconstitutional regime, under which every election in that battleground state (and at least 15 other states) is now conducted.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below.

Respectfully submitted,

CHRISTOPHER P. FINNEY
THE FINNEY LAW FIRM
4270 Ivy Pointe Blvd.
Cincinnati, OH 45245

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Ct.
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan St.
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

DAVID R. LANGDON
JOSHUA B. BOLINGER
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

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STATUTORY ADDENDUM

Ohio Revised Code

Title 35. ELECTIONS

Chapter 3517. CAMPAIGNS; POLITICAL PARTIES

Section 3517.21(B). Infiltration of campaign - false statements in campaign materials - election of candidate

(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term "re-elect" when the candidate has never been elected at a primary, general, or special election to the office for which he or she is a candidate;

(2) Make a false statement concerning the formal schooling or training completed or attempted by a candidate; a degree, diploma, certificate, scholarship, grant, award, prize, or honor received, earned, or held by a candidate; or the period of time during which a candidate attended any school, college, community technical school, or institution;

(3) Make a false statement concerning the professional, occupational, or vocational licenses held by a candidate, or concerning any position the candidate held for which the candidate received a salary or wages;

(4) Make a false statement that a candidate or public official has been indicted or convicted of a theft offense, extortion, or other crime involving financial corruption or moral turpitude;

(5) Make a statement that a candidate has been indicted for any crime or has been the subject of a finding by the Ohio elections commission without disclosing the outcome of any legal proceedings resulting from the indictment or finding;

(6) Make a false statement that a candidate or official has a record of treatment or confinement for mental disorder;

(7) Make a false statement that a candidate or official has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;

(8) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a candidate by a person or publication;

(9) Make a false statement concerning the voting record of a candidate or public official;

(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

As used in this section, "voting record" means the recorded "yes" or "no" vote on a bill, ordinance, resolution, motion, amendment, or confirmation.

(C) Before a prosecution may commence under this section, a complaint shall be filed with the Ohio elections commission under section 3517.153 of the Revised Code. After the complaint is filed, the commission shall proceed in accordance with sections 3517.154 to 3517.157 of the Revised Code.

Effective Date: 08-24-1995

RESPONDENT'S BRIEF

Supreme Court, U.S.
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No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST AND COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, AND JON HUSTED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF STATE RESPONDENTS

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
PETER K. GLENN-APPLEGATE
Deputy Solicitors
30 East Broad St., 17th Floor
Columbus, OH 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for State Respondents

QUESTION PRESENTED

Is a First Amendment challenge to a statute ripe when plaintiffs have alleged only a generalized and subjective chill of their speech and when they have established facts showing neither that they intend to engage in a course of conduct affected by the statute nor that they face any threat of an actual criminal prosecution under the statute by the named defendants?

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INTRODUCTION

This case requires the Court to resolve a clash between competing constitutional values. On one side, all can agree that courts have gone, and should go, to great lengths to nurture free speech. This Court's "overbreadth" doctrine, for example, sometimes permits parties to invoke the speech of others to avoid "chilling" that third-party speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The Court has also relaxed standards for facial challenges, sometimes requiring challengers to show merely that a "law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (citation omitted). And it has said that "'a more stringent vagueness test should apply'" in free-speech cases. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (citation omitted).

But there are equally weighty interests on the other side, interests going to the heart of our democracy. Article III adopts "'constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citation omitted). Constitutional limits prohibit courts from judging laws passed by the people's representatives except in actual cases, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006); prudential limits ensure that courts, even in such cases, reach no further than necessary, *Renne v. Geary*, 501 U.S. 312, 324 (1991). Both also promote federalism (by delaying premature federal challenges to state laws), and sound judicial decisionmaking (by directing courts not to resolve claims in amorphous settings). *Id.* at 323-24.

Under a proper balance, these limits can postpone judicial decision on "far-reaching" First Amendment issues. *Id.* at 324. The Court's history with laws banning anonymous campaign leafleting provides a good example. In 1969, it dismissed a challenge to such a law because, while the plaintiff had recently been convicted for leaflets criticizing a congressman, he did not present a justiciable case once the congressman left office. *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969). It took decades for an Article III case to arise concerning a similar law. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336-38 (1995).

Today's case also involves campaign laws (those governing false statements about candidates) and criticism of a former congressman. Before the 2010 election, Susan B. Anthony List (SBA) stated that Steven Driehaus's vote for the Patient Protection and Affordable Care Act had been a vote for taxpayer-funded abortion. Claiming these statements were false, Driehaus complained to the Ohio Elections Commission, which performs a screening function before any criminal enforcement can commence. Two former commissioners found probable cause for a Commission hearing, but it never resolved the complaint because Driehaus and SBA agreed to dismiss proceedings. SBA and Coalition Opposed To Additional Spending And Taxes (COAST) allege that they intend "to engage in substantially similar activity in the future," JA122, and use such allegations broadly to attack Ohio's laws. But their claims are unripe.

Constitutionally, Petitioners argue (at 17) that plaintiffs need not meet "rigorous or demanding" standards to state a case or controversy based on a

criminal law's potential enforcement against them. But "'threatened injury must be *certainly impending* to constitute injury in fact'"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). Far from "certainly impending," Petitioners' alleged threat of enforcement arises from the claim that they will engage in unstated "similar" speech against unstated candidates in unstated campaigns on unstated dates, which will result in unstated individuals filing complaints. On top of that, Petitioners vigorously assert that the challenged laws do not even apply, and no state actor has ever found that they would. The Commission would also have to find a violation before any criminal enforcement, and Petitioners could appeal the Commission's finding to state courts (presenting their constitutional claims in the process). If anything, therefore, Petitioners do not seek pre-enforcement review of a threatened prosecution; they seek pre-enforcement review of pre-enforcement review.

Petitioners thus fall back on the argument that normal rules do not apply. This is a First Amendment case, so they seek (at 23) to extend "chill" concerns into Article III. While overbreadth cases invoking "chill" provide important "breathing space" for free speech, *Broadrick*, 413 U.S. at 611, Article III still requires "[t]he constitutional question, First Amendment or otherwise, [to] be presented in the context of a specific live grievance," *Golden*, 394 U.S. at 110. "Chill" does not create such a grievance and should "be distinguished from the immediate threat of concrete, harmful action" that does. *United Pres-*

byterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (Scalia, J.).

Prudentially, the Court should also "ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). Petitioners' claims are not fit because it is far from clear that Ohio's laws would even apply to "similar" speech. *See Renne*, 501 U.S. at 323. The Ohio Supreme Court has interpreted the laws to adopt many safeguards from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and it might continue on that path. Further, Petitioners could have asked for an advisory opinion from the Commission, a "relatively riskless controversy-ripening tool." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 388 (D.C. Cir. 1980).

At day's end, it is safe to say that Petitioners do not like Ohio's laws very much, passionately claiming (at 55) that they should be allowed to proceed because the laws "are almost certainly unconstitutional." But there is no Article III exception for "really" unconstitutional laws. And while the First Amendment does not leave the people "'at the mercy of *noblesse oblige*,'" Pet'rs Br. 37 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)), Article III also does not leave them at the mercy of a "Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them," *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Allowing First Amendment claims to proceed outside of Article III cases upsets the Constitution's delicate balance between individual freedom and democratic self-government.

STATEMENT OF THE CASE

I. OHIO'S FALSE-STATEMENT LAWS

"At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Ohio thus has an interest in prohibiting campaign falsehoods. It is an interest shared by many States. Pet'rs Br. 55. And it is an interest this Court has recognized. While *McIntyre* invalidated an anonymous-leafleting ban, it agreed that the "interest in preventing fraud and libel" "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." 514 U.S. at 349.

A. History Of Ohio's False-Statement Laws

Like most States, Ohio historically relied on a criminal-libel statute to regulate false statements against individuals. R.C. 2901.37 (1958); 1 Statutes of the State of Ohio § 109, at 287-288 (H.W. Derby & Co. 1854). But its constitution gave protection to truthful statements. Ohio Const. art. 1, § 11. And, as applied to statements about public officials, *Garrison* required such criminal statutes to include *New York Times*' actual-malice standard. 379 U.S. at 73-75. Several years later, Ohio abolished this statute. 1972 Ohio Laws 1866, 2032-34.

Meanwhile, Ohio passed a law tailored to elections, making it a crime to "print, post, publish, circulate, or distribute a written or printed false statement, knowing the same to be false, concerning a candidate which is designed to promote the defeat of

such candidate." 1961 Ohio Laws 244, 245. In 1976, Ohio added the requirement that the Commission first find a violation. 1976 Ohio Laws 3026, 3029.

In 1991, the Sixth Circuit rejected a facial challenge to this law, finding that it "clearly c[a]me within the Supreme Court's holding[] in *Garrison*" that the First Amendment does not protect knowingly false political speech. *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 577 (6th Cir. 1991). But the court invalidated the Commission's powers to impose fines and issue cease-and-desist orders because, among other grounds, the law did not contain a clear-and-convincing-evidence standard. *Id.* at 578. Ohio amended the law after *Pestrak*, 1995 Ohio Laws 7902, 7940-43, adopting such a standard and eliminating the Commission's power to impose fines for violations, R.C. 3517.155(D)(1)-(2).

B. Current False-Statement Laws

Ohio's false-statement laws now provide:

> No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:
>
> . . .
>
> (9) Make a false statement concerning the voting record of a candidate or public official;

> (10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

R.C. 3517.21(B). This statute defines "voting record" under (B)(9) as "the recorded 'yes' or 'no' vote on" legislation or similar matters. *Id.*

To decide whether a statement is false, the Ohio Supreme Court adopted "an objective standard—that of the reasonable reader." *McKimm v. Ohio Elections Comm'n*, 729 N.E.2d 364, 370 (Ohio 2000). Courts have also said that statements cannot be "false" even if they are "potentially misleading and fail[] to disclose all relevant facts." *In re Pirko*, 540 N.E.2d 329, 332 (Ohio Ct. App. 1988). They have said that ambiguous statements cannot be "false" if they are true under a reasonable interpretation. *Serv. Emps. Int'l Union v. Ohio Elections Comm'n*, 822 N.E.2d 424, 430 (Ohio Ct. App. 2004); *see McKimm*, 729 N.E.2d at 372 (indicating court would adopt "innocent-construction rule"). And they have said that opinions cannot be "false." *Comm. to Elect Straus v. Ohio Elections Comm'n*, No. 07AP-12, 2007 WL 2949543, at *3 (Ohio Ct. App. Oct. 11, 2007).

(B)(9) and (B)(10) also require statements to be made "with intent to affect" an election. The Sixth Circuit interpreted (B)(9) to require knowledge of a falsity. *Pestrak*, 926 F.2d at 577. And the Ohio Supreme Court interpreted (B)(10) to adopt the actual-malice standard. *McKimm*, 729 N.E.2d at 372-75.

C. Commission Procedures

The Commission has seven members, three from each major political party and an unaffiliated member. R.C. 3517.152(A)(1)-(3). Its proceedings must be exhausted "[b]efore a prosecution." R.C. 3517.21(C). Those proceedings "screen away" claims; the Commission may *preclude*, not *initiate*, enforcement. *State ex rel. Common Cause/Ohio v. Ohio Elections Comm'n*, 806 N.E.2d 1054, 1059 (Ohio Ct. App. 2004). It also may not initiate its own proceedings. They get triggered only if a third party files a complaint and affidavit. R.C. 3517.153(A).

If individuals file complaints within certain times before elections, a panel of at least three members (with no party in the majority) "determine[s] whether there is probable cause to refer the matter to the full commission." R.C. 3517.156(A), (B)(1). A probable-cause hearing is brief. The panel hears arguments and/or receives evidence only if parties agree or a member requests it. Ohio Admin. Code 3517-1-10(D)(1). The panel may find no probable cause and dismiss the complaint; find probable cause and refer the complaint to the Commission; or request an investigation. R.C. 3517.156(C). If the panel finds no probable cause, the complaint gets dismissed without judicial recourse. *Common Cause*, 806 N.E.2d at 1059. If the panel finds probable cause, the Commission holds a hearing within ten business days, but the parties may agree to a delay. R.C. 3517.156(C)(2); Ohio Admin. Code 3517-1-06(B)(1).

Before a hearing, parties may seek discovery. Ohio Admin. Code 3517-1-09(C). A party may request subpoenas, R.C. 3517.153(B), but only if they

are not "overly burdensome," Ohio Admin. Code 3517-1-11(B)(3)(a). If the recipient refuses to comply, only a court may impose sanctions in potential contempt proceedings. R.C. 3517.153(B).

At the hearing, parties may make opening and closing statements, examine witnesses, and introduce evidence. Ohio Admin. Code 3517-1-11(B)(2). Ultimately, the Commission may dismiss the case; find a violation but determine that good cause exists not to refer the case to a prosecutor; or refer the case. R.C. 3517.155(A)(1), (D)(2). If the Commission finds a violation, a party may immediately appeal the adverse finding to a state court. R.C. 3517.157(D). And "[t]he ultimate decision on prosecution is clearly made by the prosecuting attorney." *Pestrak*, 926 F.2d at 578. The maximum penalty is six months in jail and/or a $5,000 fine. R.C. 3517.992(V).

Aside from hearing complaints, the Commission may issue "advisory opinions" about whether a "specific set of circumstances" violates laws within its purview. R.C. 3517.153(D); Ohio Admin. Code 3517-1-02(B). If it concludes that the facts do not violate the law, "the person to whom the opinion is directed or a person who is similarly situated may reasonably rely on the opinion and is immune from criminal prosecution and a civil action." R.C. 3517.153(D).

II. PETITIONERS' COMPLAINTS

SBA's Allegations. Before the November 2010 election, SBA chose to criticize "certain Congressmen" who voted for the Affordable Care Act because it "allows for tax-payer funded abortion." JA113. A Cincinnati-area Congressman, Steve Driehaus, was a pro-life Democrat who voted for the Act. JA35, 114.

SBA sought to post billboards stating: "'Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion.'" JA114. Driehaus's lawyer contacted Lamar Advertising, the billboard owner, and convinced it not to post the ads in exchange for not being named in legal proceedings. JA26-27, 114.

On October 4, 2010, Driehaus filed a complaint with the Commission. JA114. He alleged that SBA's statement violated R.C. 3517.21(B)(9)-(10), as well as R.C. 3517.20 (a disclaimer provision). *Id.* Driehaus later filed a second complaint for subsequent statements. JA115. In a 2-1 vote, a panel found probable cause for a full Commission hearing over whether SBA's statements violated the law. JA118. It dismissed the disclaimer allegation. *Id.* Driehaus then served "extensive discovery," including requests for documents, notices of deposition, and third-party subpoenas. JA118-20. But the parties agreed to postpone proceedings until after the election. JA120. Driehaus lost, and moved to dismiss his complaints. *Id.* SBA consented. JA109, 131.

SBA's complaint alleges these events chilled its speech. JA121. As for past speech, Driehaus's agreement with Lamar kept SBA from posting billboards. *Id.* If documents had been exchanged, SBA also "would have been required to turn over sensitive and confidential strategy materials." *Id.* As for future speech, SBA "intends to engage in substantially similar activity in the future." JA122. And Driehaus "may run for Congress again." JA122, 136-37.

SBA alleged six counts against Driehaus, the Commission's members and Executive Director in their official capacities, and Ohio's Secretary of

State. Count I alleged that R.C. 3517.21(B)(9) was facially unconstitutional because it lacked an actual-malice requirement, was vague, "relie[d] on the intent of the speaker and implications of speech to ascertain its scope and fails strict scrutiny review," and was overbroad. JA122-23. Count II alleged that (B)(9) was unconstitutional "as applied to lobbyists taking positions on political issues." JA123. Counts III and IV alleged that (B)(10) was facially unconstitutional and unconstitutional as applied for the same reasons except the lack of an actual-malice element. JA123-25. Count V alleged that Commission procedures required disclosure of protected information. JA125-26. Count VI challenged R.C. 3517.20's disclaimer requirements. JA126-27. For relief, SBA sought a declaration that (B)(9) and (B)(10) were unconstitutional on their face and as applied, and an injunction prohibiting enforcement. JA127-28.

COAST's Allegations. Before the 2010 election, COAST "desired to engage in core political speech through its mass e-mail communications." JA146. It wanted to send an email message "similar to that sought to be advanced by [SBA], *i.e.*, that Congressman Driehaus' vote in favor of ObamaCare was a vote for wasting taxpayer dollars on abortions." JA147. The email stated that Driehaus filed his complaints knowing of the Commission's "horribly partisan nature" and "history of trampling First Amendment freedoms with tortured interpretations of the truth and 'permissible' discourse." JA163. COAST did not send the email because it was "[f]earful" of "an inquisitional governmental agency who will sit in judgment of the truth of political

speech and being subjected to extensive and intrusive discovery." JA148.

As for future speech, COAST noted that, while "Driehaus lost the election," "there is the potential that he will run again for Congress." *Id.* During the 2012 election, COAST also wanted to make "the same or similar statements about other federal candidates who voted for ObamaCare, as well as about candidates in local or state elections who either voted to support or voiced support of ObamaCare." JA149. And COAST wanted to criticize Cincinnati council members for promoting city "street cars." JA150-52.

COAST alleged eight counts against the Commission, its members and Executive Director in their official capacities, and Ohio's Secretary of State. Counts I through IV challenged (B)(9) and (B)(10), and were largely identical to the same counts in SBA's complaint. JA153-55. Counts V-VII asserted preemption claims. JA155-57. Count VIII challenged the Commission's procedures. JA158-59. COAST sought remedies similar to SBA's. JA159-61.

III. PROCEEDINGS BELOW

A. Petitioners sued before the 2010 election. The district court stayed SBA's case under *Younger v. Harris*, 401 U.S. 37 (1971). Doc.14, Order, at 5-8 (docket references are to Case No. 1:10-cv-720 (S.D. Ohio)). After the election, the court consolidated the cases and lifted the stay. JA4, 109. SBA and COAST filed amended complaints adding claims about future speech. JA110, 138. Respondents moved to dismiss, and Driehaus filed a defamation counterclaim. The court granted Respondents' motions to dismiss. Pet.App.21a, 42a.

1. The court found SBA's claims unripe. Pet.App.23a-31a. It identified three factors: "'(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties [if] judicial relief [is] denied.'" Pet.App.24a (citation omitted). The court concluded that all factors militated against ripeness. No imminent harm existed because any prosecution was "contingent on a number of uncertain events." Pet.App.25a-26a & n.6. The factual record required speculation about what SBA would say, whether a candidate would file a complaint, and how the Commission would respond. Pet.App.29a. And SBA imposed any hardship on itself by agreeing to forgo Commission remedies. Pet.App.31a.

The court also held that SBA lacked standing, because a future injury was speculative. Pet.App.33a-34a. Any claim about Driehaus was particularly so, the court found, because he left for an assignment in Africa with the Peace Corps. Pet.App.36a & n.15. And the court found claims related to Driehaus moot because SBA agreed to the dismissal of his complaint. Pet.App.35a.

2. The court issued a similar opinion for COAST. Pet.App.55a-62a. As for ripeness, the court held that COAST's allegations did not implicate Ohio's false-statement laws because its speech was allegedly true. Pet.App.56a. And "[n]o complaint ha[d] been filed against COAST," so "enforcement depend[ed] on a hypothetical" chain of events. Pet.App.57a. As for

standing, a "speculative threat of future, groundless action [was] insufficient." Pet.App.61a.

3. When the district court granted Respondents' motions, it denied SBA's summary-judgment motion on Driehaus's defamation claim. Doc.66, Order. After discovery, the court granted a renewed motion. Doc.108, Order. Driehaus's appeal remains pending.

B. The Sixth Circuit affirmed. It found ripeness the most suitable doctrine, because it "counsels against resolving a case that is 'anchored in future events that may not occur as anticipated, or at all.'" Pet.App.7a (citation omitted).

1. The court applied the same ripeness factors to SBA's complaint as had the district court. It began with the likelihood of harm, which requires plaintiffs to show a credible threat that defendants will enforce the statute. The Court held that this threat was missing. Pet.App.8a.

It rejected SBA's reliance on the probable-cause finding and effort to put up billboards. Pet.App.9a-10a. "[A] prior injury, without more, is not enough to establish prospective harm." Pet.App.9a. The billboard incident was "largely irrelevant" because the Commission "had no role" in it. Pet.App.10a. The probable-cause finding was similar to an unreviewable "reason to believe" finding by federal agencies. Pet.App.10a-11a. It was "not a final adjudication, a finding of a violation, or even a warning that SBA's conduct violated law"; it merely "green-lighted further investigation." Pet.App.12a. The court added that the Commission could not initiate proceedings, and it was "rather speculative" that someone might file a complaint. *Id.* If it sufficed to allege that "any-

one" might do so, "*any* plaintiff could challenge Ohio's election laws based on *any* intended speech." *Id.* And Driehaus "remains in Africa." Pet.App.14a.

The court also found that SBA did not allege sufficient facts to show that it would violate the law. Pet.App.15a. SBA nowhere alleged that it "plans to lie or recklessly disregard the veracity of its speech." *Id.* Instead, SBA alleged that it planned to make true statements, and feared a "false prosecution." *Id.* But such a fear was an inadequate basis to challenge the law's proper applications. *Id.*

The court next found the "factual record" "not sufficiently developed." Pet.App.16a. Review would require the court "to guess about the content and veracity of [SBA's] as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law." *Id.* The statute's scope was also unclear, so the court would benefit "from knowing what the scheme prohibits." *Id.*

The court lastly found no "hardship" from delay. Pet.App.17a. No proceedings were pending. *Id.* And SBA continued to speak even when they were, including with "radio ads claiming that Driehaus voted for taxpayer-funded abortion." *Id.*

2. The court rejected COAST's claims, because it had "never been involved in a Commission proceeding and no individual ha[d] enforced or threatened to enforce the challenged laws against it." Pet.App.18a.

SUMMARY OF ARGUMENT

I. Ripeness has constitutional and prudential components.

A. Constitutionally, ripeness ensures that those seeking review based on a future injury have sufficiently alleged that injury. When this "future injury" consists of potential enforcement of a law, Article III requires individuals to show a "genuine" or "credible" threat of enforcement. The Court applies this standard on a case-by-case basis examining several factors, including whether plaintiffs have *concretely* alleged the activity in which they plan to engage; whether plaintiffs have alleged they will engage in the activity *imminently*; whether plaintiffs have adequately shown the challenged law *applies* to the activity; whether plaintiffs' future injury is sufficiently *direct*; and whether the threat consists of more than *past* application of the law.

B. Prudentially, ripeness considers the "fitness" of the claims for review and "hardship" from delay. A claim may not be fit if factual development would help the Court consider legal issues. A facial challenge may also be premature if it depends on state-law questions or if it is unclear whether the law would be constitutional as applied to the particularly alleged facts. As for hardship, it exists when plaintiffs are put to the choice of immediately altering their behavior or risking sanctions. If plaintiffs have options short of this Catch-22, hardship is less likely.

II. Petitioners' challenges to the false-statement laws are not constitutionally or prudentially ripe.

A. Petitioners fail to plead an Article III future injury. Alleged *past* injuries arising from Driehaus's

prior complaints do not illustrate a future one. They fall within the rule that past exposure to illegal conduct does not in itself show a present case. Allegations of future injury based on the prospective future candidacy of a former congressman do not suffice.

Aside from allegations about Driehaus, Petitioners' allegations of future harm are speculative. Their general allegations—that they plan to engage in "substantially similar" activity—do not satisfy the concreteness or imminence elements. Petitioners' alleged future injuries are also not direct. Many decisions by independent actors potentially stand between future speech and prosecution. Even future Commission proceedings could get triggered only by an unidentified third party, and candidates could file tort suits instead. It also remains unclear whether the laws would even apply to "similar" speech. Petitioners vigorously assert the laws would not apply, and the prior probable-cause finding merely triggered further investigation. Finally, general allegations of "chill" cannot substitute for the necessary imminent harmful action.

B. Prudential-ripeness factors confirm this result. Petitioners' facial and as-applied claims are not fit. The amorphous as-applied claims do not seek to enjoin the laws on a concrete set of facts. The facial challenges are premature. They rest on state-law questions; it is not clear whether the laws apply to any similar speech; and it is not clear that the laws could constitutionally apply to that specific speech. Petitioners also would not suffer hardship from delay. The Commission exists to provide review before enforcement, and its findings are immediately ap-

pealable to courts. Moreover, Petitioners could have requested an advisory opinion.

III. Petitioners' arguments are mistaken.

A. Petitioners' view of the credible-threat test overlooks its fact-specific nature, treating certain factors as dispositive while ignoring others. They also mistakenly support their rule with cases citing "chill" concerns to resolve First Amendment claims. Such considerations should not be incorporated into the case-or-controversy requirement. And Petitioners' cited cases are distinguishable from this one under the case-by-case approach.

B. Petitioners misapply the prudential-ripeness factors. Their assertion that this case is "fit" because they challenge the laws on their face ignores many of their claims. It also conflicts with rules of constitutional avoidance by allowing litigants to prematurely bring the broadest attacks on laws. And Petitioners' hardship arguments rest on a premise, incompatible with our federalist system, that litigants have a broad right to bring pre-enforcement facial challenges to state laws in federal courts.

ARGUMENT

Before analyzing the specific Article III doctrine at issue here, the Court should start with a bird's-eye view of Article III's "judicial Power." After all, its general limits and the purposes they serve can and should "giv[e] meaning" to specific justiciability tests. *Allen*, 468 U.S. at 761 n.26. Justice Jackson, as usual, could not have said it better: "[W]hen all of the axioms have been exhausted and all words of definition have been spent," the propriety of judicial relief often hinges on "a circumspect sense of its fitness in-

formed by the teachings and experience concerning the functions and extent of federal judicial power." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952) (discussing declaratory relief).

"'All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate . . . to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen*, 468 U.S. at 750 (citation omitted). These doctrines interpret Article III as *constitutionally* limiting courts and as granting them power to *prudentially* limit themselves. Constitutionally, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the . . . limitation of federal-court jurisdiction to actual cases or controversies." *Cuno*, 547 U.S. at 341 (internal quotation marks omitted). Prudentially, courts have long followed traditional limits on judicial power that both extend constitutional tests beyond their core, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004), and guide the courts' "discretion when [equitable] relief is sought," *Martin Tractor*, 627 F.2d at 379; *Younger*, 401 U.S. at 43-44.

These constitutional and prudential limits serve important purposes. *First*, they serve the separation of powers—both within the federal government and between the federal government and the States. *Cuno*, 547 U.S. at 341. Most relevant here, the limits implement "principles of equity, comity and federalism." *City of Los Angeles v. Lyons*, 461 U.S. 95, 112

(1983). By barring federal courts from resolving issues except in concrete cases, for example, these limits channel disputes into state courts. *See Texas v. United States*, 523 U.S. 296, 301 (1998); *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 470-71 (1945). In so doing, federal courts give their state counterparts "further opportunity to construe" state laws, *Renne*, 501 U.S. at 323, thereby avoiding "friction-generating error," *Arizonans*, 520 U.S. at 79.

Second, the limits serve democracy. *Winn*, 131 S. Ct. at 1442. They "press with special urgency in cases challenging" a legislature's work, *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality op.), "reflect[ing] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws," *Broadrick*, 413 U.S. at 610-11. "[F]ree speech issues," for example, often "have fundamental and far-reaching import." *Renne*, 501 U.S. at 324. "For that very reason," the Court must not resolve the issues in "amorphous" cases. *Id.* On top of general limits like that one, moreover, the Court has followed special "'rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.'" *Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 568-69 (1947) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).

Third, the limits serve courts. They foster sound decisionmaking by protecting courts from having to resolve far-reaching issues in "abstract" settings that would make them prone to mistakes. *Int'l Longshoremen's & Warehousemen's Union v. Boyd*, 347

U.S. 222, 224 (1954). The limits thus allow for further development. Sometimes that "development" will be of the *facts*, which can "'advance [a court's] ability to deal with the legal issues.'" *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (citation omitted). Sometimes it will be of the *law*, which can "'alter the question to be decided.'" *Renne*, 501 U.S. at 323 (citation omitted). Either way, by allowing courts to wait for proper cases to resolve legal questions, the limits help the courts answer those questions correctly.

This case implicates many of these principles. Ohio's false-statement laws reflect its elected representatives' view that "the use of the known lie as a [political] tool is . . . at odds with the premises of democratic government." *Garrison*, 379 U.S. at 75. Disagreeing with that choice, Petitioners assert the broadest attack—to facially eradicate the representatives' work and prohibit them from readjusting it in the future—before any state court or agency has decided whether the laws even cover Petitioners' proposed speech. This despite the Ohio Supreme Court's prior effort to interpret the laws in light of *New York Times* and its progeny. *McKimm*, 729 N.E.2d at 373. And Petitioners ask the Court to resolve these questions implicating numerous state laws in debating-society fashion, divorced of all facts except those that, again, have not been found to violate the law (as compared to, say, facts showing a knowing lie accusing a candidate of accepting illegal bribes or kickbacks).

The Court should keep these overarching principles in mind when interpreting the specific doctrine

at issue here, *see* Part I, when applying it to this case, *see* Part II, and when analyzing Petitioners' contrary arguments, *see* Part III.

I. RIPENESS SETS CONSTITUTIONAL AND PRUDENTIAL LIMITS ON THE JUDICIARY

Ripeness has constitutional and prudential aspects. *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Constitutionally, it ensures that those seeking review based on future injury have adequately alleged it. Prudentially, it ensures that the case provides a proper vehicle to resolve the claims.

A. Constitutionally, Ripeness Requires Adequate Allegations Of A *Future* Injury To Establish A *Present* "Case"

Article III's case-or-controversy requirement opens federal courthouse doors not simply to those suffering an *actual* injury, but also to some facing a *future* injury. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). When a plaintiff seeks access to federal courts based on that future injury, "[r]ipeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that [the] injury in fact be certainly impending." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996); 13B C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3532.5, at 551 (3d ed. 2008). Whether dressed in standing or ripeness garb, the constitutional issues "boil down to the same question": Do plaintiffs sufficiently allege a *future* injury to make out a *present* "case"? *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128 n.8 (2007).

If this "future injury" consists of threatened enforcement of a statute, regulation, or policy, the Court has interchangeably said that Article III requires individuals to show a "genuine" threat of enforcement, *id.* at 129; *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), or a "'credible'" threat of enforcement, *Holder*, 130 S. Ct. at 2717 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). But it has not explained in detail what it means by "genuine" or "credible." *Cf. Steffel*, 415 U.S. at 476 (Stewart, J., concurring) (noting that cases meeting this standard would "be exceedingly rare").

To clarify this standard, it is useful to start at the extremes. On one end, a genuine threat exists if a plaintiff has been told by police that if he again handbills he will likely be prosecuted; a friend has been charged; and he plans to handbill again. *Steffel*, 415 U.S. at 455-56; *Dombrowski v. Pfister*, 380 U.S. 479, 487-88 (1965). If these allegations did not suffice, it would require plaintiffs to undergo prosecution as the sole means to challenge criminal laws—the dilemma the Declaratory Judgment Act seeks to avoid. *MedImmune*, 549 U.S. at 129. On the other end, a genuine threat does not exist just because a law remains on the books. *See Poe*, 367 U.S. at 507 (plurality op.); *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 91 (1947); *Watson v. Buck*, 313 U.S. 387, 400 (1941). If the threat "implied by the existence of the law" sufficed, *Mitchell*, 330 U.S. at 91, it would open courts to "'generalized grievances about the conduct of'" legislatures everywhere, *Unit-*

ed States v. Richardson, 418 U.S. 166, 175 (1974) (citation omitted).

In between, "[t]he difference between an abstract question and a 'case or controversy' is one of degree." *Babbitt*, 442 U.S. at 297. That difference "is not discernible by any precise test," *id.*, or "mechanical exercise," *Allen*, 468 U.S. at 751. The Court instead balances many factors, including: (1) whether plaintiffs *concretely* identify the future activity that could trigger enforcement; (2) whether they plan to engage in that activity *imminently*; (3) whether the challenged provision *applies* to that activity; (4) whether the alleged injury *directly* flows from enforcement; and (5) whether plaintiffs' fear arises from more than *past* enforcement. *See Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 n.29 (1974).

1. *Concrete.* "[A]llegations of future injury [must] be particular and concrete." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998). "Abstract injury is not enough"; the injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Lyons*, 461 U.S. at 101-02. Plaintiffs cannot allege an "injury in only the most general terms," *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974); they must "clearly" "allege facts demonstrating [they are] proper part[ies]," *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986).

Renne and *Holder* provide a good contrast of this element. In *Renne*, central-committee members of political parties challenged a law banning them from endorsing candidates for nonpartisan office. 501 U.S. at 314-15. This Court found the suit unripe because, among other reasons, allegations that plain-

tiffs wanted to endorse candidates lacked "'concrete form.'" *Id.* at 321-22 (citation omitted). They did "not allege an intention to endorse any particular candidate," and the Court did "not know the nature of [any] endorsement, how it would be publicized, or the precise language" that would be prohibited. *Id.* In *Holder*, the Court found that plaintiffs challenging a law barring material support for terrorist entities concretely alleged future conduct. 130 S. Ct. at 2717 (citing *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1197 (C.D. Cal. 2004)). They identified the two entities they would assist, the aid they would provide, and the periods they intended to do so. *Ashcroft*, 309 F. Supp. 2d at 1196-97.

2. *Imminent.* "A threatened injury [must] be certainly impending." *Whitmore*, 495 U.S. at 158 (internal quotation marks omitted). Thus, if an injury cannot occur until plaintiffs act in a manner that might trigger it, they cannot allege they will "some day" do so. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *McConnell v. FEC*, 540 U.S. 93, 224-26 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Yet a delay in enforcement does not doom a suit if plaintiffs are currently engaging in the injury-triggering conduct, and "the inevitability of the operation" of a law is "patent." *Reg'l Rail*, 419 U.S. at 143.

A comparison of *McConnell* and *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988),

shows this divide. In *McConnell*, Senator McConnell challenged a campaign-finance law regulating ads criticizing opponents. 540 U.S. at 224-26. He "plan[ned] to run advertisements critical of his opponents in" future elections and "had run them in the past." *Id.* at 225. But the law would not apply until many years down the road, so allegations that he later planned to engage in conduct triggering the law were "too remote temporally." *Id.* at 226. In *American Booksellers*, booksellers challenged a pending law that would bar them from displaying explicit materials in a manner that gave children access. 484 U.S. at 387, 392. The booksellers alleged the law would apply to at least sixteen books they currently sold and could reach half their inventory. *Id.* at 390-91. The Court found the "imminence" element met, as the "law [was] aimed directly at plaintiffs, who, if their interpretation of the statute [was] correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392.

3. *Applicable.* An adequate connection must exist between planned activity and the challenged law. "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity." *Ala. State*, 325 U.S. at 463. Thus, the more unclear it is whether the provision would *apply* to the proposed activity and be enforced against it, the less likely the suit will be justiciable. *See Reg'l Rail*, 419 U.S. at 143 n.29; *Boyle v. Landry*, 401 U.S. 77, 81 (1971).

A third comparison—between *Younger* and *Babbitt*—helps show the necessary "applicability." In *Younger*, four plaintiffs challenged a law prohibiting

speech advocating violent acts to accomplish political change. 401 U.S. at 38-40. One was under prosecution; two felt inhibited by this prosecution in advocating for their party's desired change; the fourth feared teaching "about the doctrines of Karl Marx" or other revolutionary works. *Id.* Only the individual undergoing prosecution stated an Article III case. If the others "had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true—either on the admission of the State's district attorney or on any other evidence—then a genuine controversy might be said to exist." *Id.* at 42. But mere "inhibited" speech did not suffice. *Id.*

In *Babbitt*, a union sued to enjoin a farm-labor law. 442 U.S. at 292. It challenged, among others, a consumer-publicity provision barring "dishonest, untruthful and deceptive publicity" about agricultural products. *Id.* at 301. The union had "actively engaged in consumer publicity campaigns in the past" and would inevitably make good-faith misstatements in the future. *Id.* The Court found the challenge justiciable, noting it was "clear that [the union] desire[d] to engage at least in consumer publicity campaigns prohibited by the Act." *Id.* at 303; *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992) (union's "members inevitably would violate the statute as the union interpreted it").

4. *Direct.* A future injury must be "direct," *Lyons*, 461 U.S. at 102—one that arises *directly* from (and can be redressed *directly* by an injunction against) the challenged law, *see Clapper*, 133 S. Ct. at 1149-50. In standing's terminology, the injury

must be "fairly traceable" to defendants, and "redressed" by an injunction against them. *Lujan*, 504 U.S. at 560-61.

On the front end, an injury is too indirect if its *occurrence* "require[s] guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150. In *O'Shea*, for example, plaintiffs sought to enjoin a magistrate and judge from discriminatorily enforcing laws. 414 U.S. at 491-92. This Court found plaintiffs' threatened injury too indirect: "if [plaintiffs] proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before [defendants], they will be subjected to [those defendants'] discriminatory practices." *Id.* at 497.

On the back end, an injury is too indirect if its *redressability* rests on "unfettered choices made by independent actors." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality op.). A statute thus will not create a "direct" injury when an unchallenged law could also trigger that injury. *See Clapper*, 133 S. Ct. at 1149. In *Renne*, for example, the Court expressed skepticism about the challenge to the law banning party endorsements partially because an unchallenged law "might be construed to prevent" the same speech. 501 U.S. at 319.

5. *Past.* Lastly, a *future* injury cannot be based simply on a *past* one. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96; *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 n.2 (1977) (per curiam); *Rizzo v.*

Goode, 423 U.S. 362, 372 (1976). A justiciable case must exist for each *claim*, *Cuno*, 547 U.S. at 352, and each *remedy*, *Lyons*, 461 U.S. at 111.

Golden illustrates this rule. The plaintiff had been prosecuted under an anonymous-leafleting prohibition during a 1964 election when he passed out literature criticizing a congressman's vote. 394 U.S. at 105-06 & n.2. The plaintiff sought to distribute similar literature in future elections. *Id.* at 106. While the congressman had since become a judge, the district court found the challenge justiciable because the law deterred plaintiff from again distributing anonymous handbills. *Id.* at 107. This Court reversed. *Id.* at 108-10. "[I]t was most unlikely that the Congressman would again be a candidate," and the plaintiff's allegations of deterred speech did not establish a "specific live grievance." *Id.* at 109-10.

B. Prudentially, Ripeness Considers The Propriety Of Judicial Review

Prudential ripeness asks practical questions: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties" from delayed review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

Fitness. Even if adequate injury exists, courts may decline review if a case does not provide a good vehicle to decide the claims. "Fitness" factors run the gamut, from "considerations of timeliness and maturity" to those "of concreteness, definiteness, [and] certainty." *Rescue Army*, 331 U.S. at 573-74; *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972).

A claim may not be fit, for example, if "factual development would 'significantly advance [a court's]

ability to deal with the legal issues.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (citation omitted). So when a First Amendment claim would require the Court to weigh "competing associational and governmental interests," the Court may need a "concrete fact situation" to undertake the necessary balancing. *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 56 (1974).

Similarly, a claim may not be fit if the challenged action has not sufficiently "matured." *See Nat'l Park*, 538 U.S. at 807; *W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 312 (1967). This prematurity factor has heightened importance for challenges to state laws over which this Court lacks the last word. "Postponing consideration of [such claims] until a more concrete controversy arises" can "permit[] the state courts further opportunity to construe" the laws, and "perhaps in the process to 'materially alter the question'" presented. *Renne*, 501 U.S. at 323 (citation omitted). Indeed, state-law resolution could altogether eliminate the need to resolve constitutional issues. *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 540 (6th Cir. 2010).

This factor also has heightened importance for constitutional claims. "[T]he First Amendment involvement in [a] case" does not "render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). The Court thus prefers considering *as-applied* challenges before *facial* ones. *Renne*, 501 U.S. at 324. The opposite "course would convert use of the overbreadth doctrine from a necessary means

of vindicating the plaintiff's right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989).

Hardship. Prudential ripeness also considers hardship to the parties. *Ohio Forestry*, 523 U.S. at 733-36. The classic case of hardship exists when, without review, plaintiffs immediately are put to the choice of complying with a challenged provision that unambiguously applies to their conduct or violating that provision on threat of "serious criminal and civil penalties." *Abbott Labs.*, 387 U.S. at 153. Hardship is less likely to exist if plaintiffs do not face this "immediate dilemma." *Reno*, 509 U.S. at 57.

Even if the dilemma looms, hardship is less likely when plaintiffs have options short of any Catch-22. Where, for example, a statute allows plaintiffs to seek advisory opinions about whether their conduct violates it, such a remedy militates against a hardship finding. *Martin Tractor*, 627 F.2d at 384-86; *see also Miles Christi*, 629 F.3d at 538 (plaintiffs could seek variance); *Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 693 (8th Cir. 2003) (plaintiff could seek opinion); *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997) (plaintiffs could seek "administrative decision"); *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 531 (3d Cir. 1988) (plaintiffs had "expeditious means" of review). Even if these alternative avenues might add more expense, moreover, that does not necessarily create a sufficient hardship. *See Ohio Forestry*, 523 U.S. at 735; *Lujan v. Nat'l Wildlife*

Fed'n, 497 U.S. 871, 894 (1990); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

II. PETITIONERS' AMENDED COMPLAINTS DO NOT ASSERT CONSTITUTIONALLY OR PRUDENTIALLY RIPE CLAIMS

The Sixth Circuit properly affirmed the dismissal of Petitioners' complaints. In the Sixth Circuit and here, Petitioners have not sought to restore claims regarding Ohio's disclaimer provision, claims regarding Commission procedures, or preemption claims. The Court thus should affirm the dismissal of SBA Counts V-VI and COAST Counts V-VIII. JA125-27, 155-59; *United States v. Jones*, 132 S. Ct. 945, 954 (2012). Instead, Petitioners challenge the false-statement laws, but they fail to allege justiciable claims concerning those laws either.

A. Petitioners Do Not Adequately Allege An Article III Future Injury

Petitioners fail to plead an adequate future injury because they rely largely on *past* allegations concerning Driehaus, and assert only generic allegations of *future* injury concerning others.

1. Petitioners' alleged past injury arising from Driehaus's complaints does not establish a future one

The complaints initially detail Driehaus's actions during the 2010 elections. As for SBA, Driehaus allegedly prevented it from posting billboards, forced it to participate in Commission proceedings, and requested discovery. JA114, 118-22. As for COAST, he chilled it from sending an email. JA146-48.

These alleged *past* injuries do not establish the necessary *future* one. *Lyons*, 461 U.S. at 102-05. Instead, they fall within the rule that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96; Pet.App.9a.

In this regard, this case is like *Golden*. There, as here, plaintiffs challenged speech-regulating laws. In *Golden*, the law banned anonymous leafleting, 394 U.S. at 104; in this case, the laws ban false statements, R.C. 3517.21(B)(9)-(10). There, as here, plaintiffs' alleged prior speech implicated those laws. In *Golden*, the plaintiff criticized Congressman Multer's vote against amendments disapproving of Soviet and Middle Eastern anti-Semitism, 394 U.S. at 105 & n.2; in this case, Petitioners criticized Congressman Driehaus's vote for the Affordable Care Act, JA114, 146-47. There, as here, the congressman left office, and plaintiffs alleged he could be a "'candidate for Congress again.'" 394 U.S. at 109; JA122, 148. *Golden* rejected these "allegations of future injury" based "on the prospective future candidacy of a former Congressman." *Whitmore*, 495 U.S. at 158. Petitioners' claims that Driehaus "'may run for office again,'" therefore, "are too speculative." *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013). That is particularly true since he remains overseas, JA179-82, and expressed considerable ambivalence about Capitol Hill, JA136-37.

2. Petitioners' general allegations of future injury are too speculative

Apart from allegations about Driehaus, the only forward-looking allegation in SBA's complaint is that it "intends to engage in substantially similar activity in the future." JA122. The only forward-looking allegations in COAST's complaint are that it seeks to make "the same or similar statements" about others who supported the Affordable Care Act in the next election cycle and to "aggressively" speak about members of Congress. JA149-50. (COAST's complaint also contains, but it rightly does not cite, speculative allegations concerning Cincinnati council members. JA150-53; *Younger*, 401 U.S. at 42.) As Petitioners' future injuries, the complaints allege the threat of enforcement of the false-statement laws and of merely having to participate in a Commission hearing. JA121-22, 148-50. They also allege the false-statement laws will "chill" future speech. JA121, 149. These sparse allegations do not suffice.

a. The general allegations concerning future conduct—that Petitioners plan to engage in "substantially similar" activity—do not satisfy the concreteness or imminence elements. As in *Renne*, the complaints do not identify "any particular candidate" or the "precise language" they plan to use. 501 U.S. at 321-22 As in *Lujan*, the complaints assert "some day" intentions to speak in upcoming elections. 504 U.S. at 564; *McConnell*, 540 U.S. at 224-26.

Indeed, the plaintiff in *Golden* also relied on generic statements. His complaint alleged an intent to distribute "'similar anonymous leaflets'" during the 1966 election and "'in subsequent election campaigns

or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign.'" 394 U.S. at 105-06. Before this Court, he argued his leaflet had been "a political tract," not a "'[d]on't vote for Multer' leaflet," suggesting that it discussed an issue of "significance to the political life of our time." Appellee Br. at 32, *Golden v. Zwickler*, 394 U.S. 103 (1969) (No. 370). Yet the Court held that the "record" showed that plaintiff's "sole concern" had been the congressman and that the general allegations were directed only at him since he had held a party position. 394 U.S. at 109 & n.5. It thus held that the district court "should have dismissed his complaint." *Id.* at 110; *see also Mitchell*, 330 U.S. at 87-91 & n.18 (rejecting general allegations that plaintiffs wanted "to engage actively in political management and political campaigns").

The same is true here. If anything, the standards should be more demanding now. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-63 (2007). Since the Court has retired the "no-set-of-facts test," *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009), it no longer "presumes that general allegations embrace those specific facts that are necessary to support the claim," *Nat'l Wildlife Fed'n*, 497 U.S. at 889 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Petitioners' failure to identify the targets or content of future speech shows they lack a "specific live grievance." *Golden*, 394 U.S. at 110. As for targets, it is far from clear a future Ohio candidate would draw Petitioners' "similar" speech. SBA's 2010 campaign focused on "certain Congressmen," JA113; i.e.,

"so-called 'pro-life' Democrats who voted for the" Act, JA52. COAST's speech was even more closely tied to Driehaus; it criticized his decision to file complaints with the Commission on the ground that SBA's speech was true. JA162-63. As for content, in the false-statement context, "precise language" matters. *Renne*, 501 U.S. at 322. After all, the "reasonable import of a defendant's statements—whether, for example, they fairly convey a false representation"—depends on the words chosen. *United States v. Williams*, 553 U.S. 285, 306-07 (2008); *see Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (noting, as a constitutional matter, that "falsity" may turn on specific words and punctuation).

b. Additionally, Petitioners' alleged injuries are not "direct." A prosecution would depend on a chain of events that surpasses "path[s]" to injury this Court has found too speculative. *Whitmore*, 495 U.S. at 157. Between speech and penalties could potentially lie: (1) a complainant filing a complaint; (2) a panel's decision to refer the case to the Commission; (3) a Commission finding that the speech violated the law; (4) a Commission decision to refer a case to a prosecutor; (5) a trial court's decision upholding the Commission's finding; (6) an appellate court's affirmance; (7) the Ohio Supreme Court's decision to affirm or deny review; and (8) the prosecutor's decision about whether to prosecute. The "guesswork as to how [the many] independent decisionmakers [would] exercise their judgment" prevents a prosecution itself from qualifying as an Article III injury. *Clapper*, 133 S. Ct. at 1150.

The complaints thus rely not just on threatened prosecution, but also on threatened administrative proceedings before the Commission with the potential for discovery. JA121-22, 149. But that alleged injury is itself indirect. On the front end, the Commission is powerless to initiate proceedings. R.C. 3517.153(A). Any proceeding would rest on third-party responses to speech about an unidentified candidate. As the Sixth Circuit noted, if Petitioners could make out an imminent injury by alleging that a "'citizen in Ohio who supports Obama'" might file a complaint, "*any* plaintiff could challenge Ohio's election laws based on *any* intended speech." Pet.App.12a. Just as environmental groups with hundreds of thousands of members cannot rely on the "statistical probability" that a member would visit affected sites to show a concrete injury, *Summers v. Earth Island Instit.*, 555 U.S. 488, 497-98 (2009), Plaintiffs cannot rely on a "probability" that some unidentified individual would file a complaint.

Further, the amended complaints identify nobody who threatens to do so. When the Affordable Care Act was front and center in 2010, *only* Driehaus filed a complaint (even though SBA's literature suggested it planned to target another Ohio representative, JA52). The only other person identified as possibly doing so is Secretary of State Husted, who has a duty to refer violations. JA113, 143. But the Secretary did not file a complaint for SBA's prior speech within the two-year window, R.C. 3517.157(A), making it speculative to assume he would change course now.

It is equally speculative to suggest that a proceeding would require Petitioners to "turn over sensitive

and confidential strategy materials." JA121-22. They could ask the Commission to limit discovery, Ohio Admin. Code 3517-1-11(B)(3)(a), just as SBA asked the district court to do in regard to Driehaus's defamation counterclaim, Doc.95, Mot. for Protective Order. And no such harm materialized previously because SBA and Driehaus agreed to delay proceedings until after the election. Pet.App.27a. Unlike in a civil suit, moreover, a complaint with the Commission must include an affidavit based on personal knowledge and subject to penalties for perjury. R.C. 3517.153(A). And the Commission may require the complainant to pay its costs and the other side's attorney's fees for frivolous filings. R.C. 3517.155(E); *Massey v. Ohio Elections Comm'n*, No. 13AP-20, 2013 WL 4055739, at *1 (Ohio Ct. App. Aug. 13, 2013).

On the back end, Petitioners' relief would not "directly" redress discovery risks. *See Clapper*, 133 S. Ct. at 1149. "To the extent [Ohio's false-statement laws] may be underinclusive, Ohio courts also enforce the common-law tort of defamation." *McIntyre*, 514 U.S. at 350 n.13. If the laws were invalidated, candidates could use tort options "in [their] absence." *Renne*, 501 U.S. at 319; *Babbitt*, 442 U.S. at 305 (finding union's challenge to arbitration provision non-justiciable because employers could "elect to pursue a range of responses other than" provision). This case is Exhibit A. After SBA sued, Driehaus filed a defamation claim. Doc.27, Answer. And in the letter to Lamar, his lawyer noted that, if Lamar posted SBA's billboards, they might "proceed against [it] before the [Commission] *and/or in a court of law*." JA27 (emphasis added). Because "invalidation

of [the laws] may not impugn" a candidates' ability to file claims, *Renne*, 501 U.S. at 319, it might not redress the risks of threatened litigation and discovery.

c. Petitioners also have not alleged that the false-statement laws would even apply to "similar" speech. They vigorously assert the laws do *not* apply because it would be truthful. JA75, 162. That makes Petitioners another "degree," *Babbitt*, 442 U.S. at 297, removed from the leafleter in *Golden* (whose conduct led to a prosecution, 394 U.S. at 104-05); the humanitarian groups in *Holder* (whose conduct this Court found to fall within the law, 130 S. Ct. at 2717-18); the booksellers in *American Booksellers* (who claimed that the law could reach half their inventory or at least about a shelf's worth, 484 U.S. at 390-91, 394), or the union in *Babbitt* (which "desire[d] to engage at least in consumer publicity campaigns prohibited by the Act," 442 U.S. at 303).

Instead, as the Sixth Circuit found, Pet.App.15a, Petitioners' complaints allege that the prior probable-cause decision shows that they might face a "false prosecution." But since "[t]he ultimate decision on prosecution is clearly made by the prosecuting attorney," *Pestrak*, 926 F.2d at 578, it is speculative to suggest that this alleged "false" finding would lead to enforcement. *Younger*, 401 U.S. at 42. That is especially so since parties may appeal Commission findings, where courts "'make an independent examination of the whole record.'" *Flannery v. Ohio Elections Comm'n*, 804 N.E.2d 1032, 1036 (Ohio Ct. App. 2004) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)).

Even with respect to a Commission finding, it is important to remember the preliminary nature of the probable-cause decision. That finding was "not a final adjudication, a finding of a violation, or even a warning that SBA's conduct violated Ohio law." Pet.App.12a. It merely "green-lighted further investigation" after a review of the pleadings. *Id.* A preliminary belief in the need for further review after a brief hearing might be explained by the complexity of the topic; the Affordable Care Act, after all, "stretch[es] over 900 pages." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). In short, neither a panel member nor the full Commission ever found a violation. *Cf. Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 512 (1984) (holding that because state agency did not conclusively apply provision, the issue was "not ripe for review").

Further, as the State Respondents told the Sixth Circuit, such an ultimate finding would likely prove difficult in light of the complexities, structure, and negotiation history of the Affordable Care Act. Appellees Br., No. 11-3894, at 24 n.5 (6th Cir.). The Ohio Supreme Court might categorically hold that statements representing "rational interpretations" of ambiguous topics cannot be knowingly or recklessly false. *See McKimm*, 729 N.E.2d at 373 (distinguishing *Bose*, 466 U.S. at 512). Even if the full Commission did find a violation, that still would not result in "civil enforcement" in the traditional sense because the Commission cannot impose sanctions like fines or cease-and-desist orders. *Cf. Ohio Civil Rights*

Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 626 n.1 (1986); *Babbitt*, 442 U.S. at 302 n.13.

d. The complaints, lastly, allege the threat of "chilled" speech. JA121, 149. But allegations of "chill" do not establish an Article III injury. As then-Judge Scalia noted, the "harm of 'chilling effect'"—the "present deterrence from First Amendment conduct because of the difficulty of determining the application of a regulatory provision to that conduct"—does not create a case or controversy. *United Presbyterian*, 738 F.2d at 1380. Rather, "[t]he constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." *Golden*, 394 U.S. at 110. And "chill" allegations cannot substitute for what is required—"a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 14 (1972). Either Petitioners have sufficiently asserted a genuine threat of imminent injury (in which case they have stated an Article III case) or they have not (in which case they have not).

In sum, the balance of factors that this Court considers under its "case-by-case" approach shows that the complaints do not allege an adequate Article III future injury. *Reg'l Rail*, 419 U.S. at 143 n.29.

B. Prudential Factors Reinforce That The Complaints Should Be Dismissed

Prudential-ripeness factors confirm the Sixth Circuit's result. None of Petitioners' claims is fit, and they would not suffer undue hardship from delay.

Fitness. Petitioners bring as-applied and facial challenges to the false-statement laws. JA122-25, 153-55. Neither is fit. To begin with, for the reasons discussed, both rest on "contingent future events

that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 299 (internal quotation marks omitted). Whether or not Petitioners have alleged Article III injuries, those same facts at least show that their claims lack the "concreteness, definiteness, [and] certainty" to be fit for decision. *Rescue Army*, 331 U.S. at 573.

Turning to the as-applied claims (Counts II and IV), they are "as applied" in name only. They do not ask courts to declare Ohio's laws unconstitutional on a specific set of concrete facts. Instead, they assert that the laws are unconstitutional "as applied to lobbyists" (for SBA) or "citizens and organizations" (for COAST) that "tak[e] positions on political issues, because [they] unconstitutionally penalize[] protected opinions." JA123-25, 154. It is difficult to imagine more "ill-defined" claims, *Renne*, 501 U.S. at 324, and Petitioners fail to "flesh[] out" their ambiguous scope, *Nat'l Wildlife Fed'n*, 497 U.S. at 891. Since these claims do not identify a specific set of applications, imagine a court's difficulty crafting an injunction providing sufficient notice. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). And Ohio's Constitution has an "'independent guarantee of protection' for statements that constitute opinion." *Straus*, 2007 WL 2949543, at *3 (citation omitted). So these claims ask federal courts to grant as-applied injunctions in the face of substantial uncertainty over whether state courts would hold that the laws reach the enjoined applications.

The facial challenges (Counts I and III) fare no better. They allege the false-statement laws are unconstitutional because R.C. 3517.21(B)(9) lacks an

actual-malice requirement; because both (B)(9) and (B)(10) are vague; because both rely "on the intent of the speaker and implications of speech to ascertain [their] scope and fail[] strict scrutiny review"; and because both are overbroad in that they cover more than "express advocacy." JA122-23, 153-54. These claims are triply premature.

For one, as a first step in such a challenge, courts must "construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293. That duty is simple enough for federal laws. *Stevens*, 559 U.S. at 474-77. But this case involves state law. In that context, a facial challenge should not proceed if it requires courts to consider "questions of construction, essentially matters of state law." *Rescue Army*, 331 U.S. at 574. The complaints' facial challenges do just that. Constitutional analysis might be different for a law that lacks an intent element or reaches subjective implications than for one that does not. JA122-23, 153-54. Further, "[s]tate courts, when interpreting state statutes, are . . . equipped to apply th[e] cardinal principle" of constitutional avoidance. *Arizonans*, 520 U.S. at 78. The Ohio Supreme Court has taken this Court's lead when interpreting (B)(10) in the past, *McKimm*, 729 N.E.2d at 370-74, and may continue on that path to make it largely coextensive with civil defamation. Because Petitioners' facial claims cannot avoid state-law questions, they are premature. *Cf. Babbitt*, 442 U.S. at 306-13.

For another, no matter how state law is interpreted, it is not clear it would cover Petitioners' "sim-

ilar" speech. Ripeness is designed to "avoid[] the premature resolution of constitutional questions, including First Amendment questions." *Miles Christi*, 629 F.3d at 540; *see Ala. State*, 325 U.S. at 463. The Ohio Supreme Court could hold that statements cannot meet the law's actual-malice standard if "the language chosen was 'one of a number of possible rational interpretations'" of an ambiguous topic. *Bose*, 466 U.S. at 512 (citation omitted); *cf. McKimm*, 729 N.E.2d at 373. It is thus premature "to decide the constitutionality" of these laws before it is "clear that [they] would be applied." *W.E.B. DuBois*, 389 U.S. at 312; *Brown*, 468 U.S. at 512. Such "review now may turn out to have been unnecessary" if statutory review later would remedy any alleged injury. *Ohio Forestry*, 523 U.S. at 736.

For a third, it is not clear a true *as-applied* challenge (that is, one tailored to Petitioners' proposed speech) would have been unsuccessful. "As-applied challenges—the 'basic building blocks of constitutional adjudication'—remain the preferred route." *Warshak v. United States*, 532 F.3d 521, 529 (6th Cir. 2008) (Sutton, J.) (citation omitted). Even in free-speech cases, "'[i]t is not the usual judicial practice, . . . nor [does the Court] consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied." *Renne*, 501 U.S. at 324 (quoting *Fox*, 492 U.S. at 484-85). Yet Petitioners did not bring narrow claims. While *litigants* might not prefer the *courts'* preferred route, ripeness ensures courts, not litigants, get to decide whether to depart from "[t]he case-by-case approach" that is the

"traditional, and remains the normal, mode of operation." *Nat'l Wildlife Fed'n*, 497 U.S. at 894; *cf. United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 592 (1957) (noting that, while litigants "are prone to shape litigation," "the Court has its responsibility").

Hardship. The hardship factor confirms that Petitioners' claims are unripe. This was not a classic case where Petitioners faced the "immediate dilemma" of changing conduct or facing sanctions. *Reno*, 509 U.S. at 57. The laws apply during the course of election campaigns. R.C. 3517.21(B). When Petitioners filed their amended complaints, any election lay substantially in the future. JA5-6.

Further, the Commission exists to provide review over claims *before* enforcement. It acts as a buffer between prosecutors and speech. And parties obtain access to courts from its adverse findings. R.C. 3517.157(D); *see, e.g.*, *Serv. Emps.*, 822 N.E.2d at 428; *Flannery*, 804 N.E.2d at 1035. Here, however, SBA agreed to delay and then dismiss Commission proceedings. JA131. But, after the probable-cause hearing, Driehaus could *not* dismiss his complaints without permission. R.C. 3517.157(B)(1). If SBA objected, the Commission would have taken that into account when deciding whether to dismiss.

Even then, Petitioners could have sought an advisory opinion. R.C. 3517.153(D). If the Commission had found that proposed statements did *not* violate the false-statement laws, it would have immunized them. *Id.* If the Commission found that Petitioners' statements *did* violate the laws, it would have served as a "controversy-ripening tool." *Martin Tractor*, 627

F.2d at 388. To be sure, the advisory-opinion process takes a few months, which might prove infeasible in the heat of election season. But Petitioners faced no such constraints when they filed their amended complaints. Had Petitioners traveled an administrative course, rather than a judicial one, they could have eliminated any alleged dilemma from the prior probable-cause finding years ago. And this option would have eliminated any need for courts prematurely to "undertake the most important and the most delicate of [their] functions." *Rescue Army*, 331 U.S. at 569.

III. PETITIONERS' CONTRARY ARGUMENTS ARE MISTAKEN

Petitioners characterize the Sixth Circuit's analysis as, among other things, "wrongheaded" (at 15), "perverse" (at 34), "bizarre" (at 40), and "warped" (at 52). Respectfully, Petitioners are mistaken.

A. Petitioners' "Credible Threat" Test Substantially Reduces Article III Standards

Petitioners are incorrect in their interpretation of Article III's "credible threat" standard, their efforts to incorporate First Amendment questions into that standard, and their application of it here.

1. Petitioners' bright-line rule ignores the fact-specific nature of the inquiry

Rejecting the view that cases meeting the genuine-threat test would be "exceedingly rare," *Steffel*, 415 U.S. at 476 (Stewart, J., concurring), Petitioners argue (at 16) for a test that "is not especially demanding." They assert (*id.*) that any plaintiff whose "intended speech arguably falls" within a "speech-proscribing law" can sue if the law "has not been dis-

avowed." But a Court that has said that a future injury "'must be *certainly impending*'" rather than merely "'*possible*,'" *Clapper*, 133 S. Ct. at 1147 (citation omitted), and that the justiciability question "is not discernible by any precise test," *Babbitt*, 442 U.S. at 297, might find an easy-to-meet, bright-line rule surprising. Petitioners overlook necessary elements of the inquiry as well as its fact-specific nature.

First, the argument (at 16-25) that plaintiffs need to allege only an "intent to speak" downplays normal standards—that plaintiffs identify a concrete, imminent, and direct injury. *Clapper*, 133 S. Ct. at 1147. The Court has not exempted threat-of-enforcement cases from these rules. *Renne* applied them, when it held that political parties had not concretely alleged future endorsements. 501 U.S. at 321-22; *Mitchell*, 330 U.S. at 87-91 n.18. And *Holder* applied them, when it held that humanitarian groups had identified the specific services they would provide the specific entities. 130 S. Ct. at 2717; *see Elend v. Basham*, 471 F.3d 1199, 1211 (11th Cir. 2006).

Second, Petitioners repeatedly suggest (at 16, 19, 38) that a credible threat exists if authorities do not "disavow" the law. This turns a *single* factor into the *dispositive* one. In *Babbitt*, for example, the Court merely added that "[m]oreover" the state had not "disavowed" penalties. 442 U.S. at 302; *see Holder*, 130 S. Ct. at 2717; *Am. Booksellers*, 484 U.S. at 393. In *Golden*, *Renne*, and *Mitchell*, by contrast, no disavowal occurred. In *Golden*, a prosecution had just happened, 394 U.S. at 104-05; in *Mitchell*, proceedings were ongoing to terminate the sole plaintiff who presented a justiciable claim, 330 U.S. at 91-93; in

Renne, silence existed, 501 U.S. at 322; *cf. Boyd*, 347 U.S. at 225 (Black, J., dissenting). This "disavowal" rule would at least require the Court to disclaim cases holding that Article III requires more than the threat "implied by the existence of the law." *Mitchell*, 330 U.S. at 91; *Watson*, 313 U.S. at 400; *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) ("We have held that neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement."); *J.N.S., Inc. v. Indiana*, 712 F.2d 303, 305 (7th Cir. 1983); *McCollester v. City of Keene*, 668 F.2d 617, 621 (1st Cir. 1982).

Third, Petitioners argue (at 31-36) that plaintiffs' view about whether their activities violate the law "has nothing to do with the credible-threat test." But there is at least a "degree" difference between litigants who allege their conduct could violate the law and litigants who vigorously allege it would not. *Babbitt*, 442 U.S. at 297; *Ala. State*, 325 U.S. at 463 ("[o]nly those to whom a statute applies and who are adversely affected by it" may challenge it). Indeed, in cases this Court has let proceed, plaintiffs generally asserted their activities violated an arguable interpretation of the law. In *Babbitt*, for example, the union alleged that its inevitable misstatements violated a law that arguably lacked an actual-malice element. 442 U.S. at 301. Similarly, Wisconsin Right to Life "recognized" its ads "would be illegal" under the Bipartisan Campaign Reform Act. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 460 (2007). And the booksellers in *American Booksellers* alleged that "half of their inventory" might fall within a statute

regulating materials deemed "'harmful to juveniles.'" 484 U.S. at 387, 390-91.

Fourth, Petitioners contend (at 36-41) that a past government action's *preliminary* nature should have no effect on whether the action establishes a credible threat of future injury. This, too, overstates things. That the government had merely "green-lighted further investigation" in a past case, Pet.App.12a, makes a genuine threat *less likely* than if it had concluded, as in *Steffel*, that prior action violated the law. 415 U.S. at 455-56; *see Am. Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748, 753 (D.C. Cir. 1984) (Ginsburg, J.) (finding claim unripe partially because government action consisted of "only the advice of an officer Congress did not authorize to speak definitively"); *Digital Props.*, 121 F.3d at 590 (claim unripe without "conclusive administrative decision").

2. Petitioners mistakenly extend "chill" cases into the case-or-controversy requirement

Petitioners justify (at 21-25, 36, 41-44) a reduced case-or-controversy requirement based on the risk of "chill" from speech-regulating laws. "[I]f the risk of 'chill' is enough to invalidate a statute *on the merits*," the argument goes (at 23), "it is *a fortiori* sufficient to allow the speaker to seek preemptive review." The Court should reject these efforts to incorporate merits considerations into the case-or-controversy rule.

To begin with, the Court's cases have not made this leap. Petitioners' cited cases (at 21-23) involved, among others, injunction standards, *see Aschroft v. ACLU*, 542 U.S. 656, 670-71 (2004), defamation rules, *see Rosenbloom v. Metromedia, Inc.*, 403 U.S.

29, 50 (1971); *N.Y. Times*, 376 U.S. at 279, and, most commonly, the "overbreadth" doctrine, *see Hicks*, 539 U.S. at 119; *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984); *Dombrowski*, 380 U.S. at 486. None addressed Article III's constitutional core.

The Court's Article III cases, by contrast, have not adopted special speech rules. Those finding no Article III case have recognized that a case or controversy must exist for whatever type of claim a plaintiff presents—"*First Amendment or otherwise.*" *Golden*, 394 U.S. at 110 (emphasis added); *Laird*, 408 U.S. at 13-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."). Conversely, those finding an Article III case do not mention "chill." *See Holder*, 130 S. Ct. at 2717; *Babbitt*, 442 U.S. at 297-303; *see also Barr*, 956 F.2d at 1193 (noting that "*Babbitt* did not mention a 'chilling effect'"). While *American Booksellers* referenced risks of "self-censorship," the booksellers were asserting the rights of *bookbuyers* in an *overbreadth* claim. 484 U.S. at 392-93 & n.6.

As these cases show, it is only to determine whether a plaintiff may invoke the "overbreath" doctrine—an exception to the prudential rule against third-party standing—"that 'chilling effect' has anything to do with the doctrine of standing." *United Presbyterian*, 738 F.2d at 1379. The cases cite a "chilling effect" "as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it." *Id.* at 1378. The "harm of 'chilling effect'" thus does not create a

case or controversy. *Id.* at 1380. Instead, an "immediate threat of concrete, harmful action" must exist. *Id.*; *Morrison v. Bd. of Educ. of Body Cnty.*, 521 F.3d 602, 609-10 (6th Cir. 2008) (adopting *United Presbyterian*). Petitioners wrongly seek to incorporate the free-speech merits (i.e., the *reason*) into the case-or-controversy requirement (i.e., the *harm*).

To be sure, Petitioners (at 41-43) distinguish *Clapper*, *Laird*, and *United Presbyterian* as involving government-surveillance activities rather than laws "*directly proscrib[ing] or penaliz[ing] speech.*" But other cases have also refused to incorporate "chill" concerns into the case-or-controversy requirement. *Younger* held that the plaintiffs had not pleaded a case even if the speech-proscribing law chilled (in their words, "'inhibited'") their speech. 401 U.S. at 42. *Golden* held that the plaintiff had not stated a "live grievance" even if the anonymous-leafleting ban chilled (in his words, "deterr[ed]") his speech. 394 U.S. at 107, 110. When rejecting "chill" allegations, moreover, *Laird* cited *Mitchell*, which involved a law prohibiting public employees from engaging in political speech. 408 U.S. at 14; *see Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 761 (11th Cir. 1991) (rejecting attempt to distinguish *Laird* as involving surveillance law).

This refusal to conflate First Amendment and Article III questions follows from first principles. "Implicit" in that fusion "is the philosophy that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they be-

come obstacles to that transcendent endeavor." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 489 (1982). Here, for example, Petitioners repeatedly foreshadow their view on the merits, suggesting (at 55) the Court should let them proceed because Ohio's laws "are almost certainly unconstitutional" after *United States v. Alvarez*, 132 S. Ct. 2537 (2012). But this notion that courts should relax Article III's standards based on their views of a constitutional claim's merits "has no place in our constitutional scheme." *Valley Forge*, 454 U.S. at 489.

3. Petitioners' application of their credible-threat standard lacks merit

Petitioners err when applying the credible-threat standard to their amended complaints.

a. They initially suggest (at 25) that the Court should look to the time of their original complaints. They rightly spend one sentence on this argument. Standing ensures that an adequate injury exists based on the claims and allegations in the amended complaints. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 50-51 (1991) (looking "at the time the second amended complaint was filed"); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."). And ripeness ensures that an adequate future injury remains at the time of decision. *Anderson v. Green*, 513 U.S. 557, 559 (1995) (per curiam).

b. Petitioners claim (at 25-26) that the prior probable-cause finding and the district court's "hold-

ing, in the related defamation action, that SBA's statements were factually false" makes this case easier than *Holder*, *American Booksellers*, and *Babbitt*. But the district court did not "hold" that SBA's statements were false; it held that it could not grant summary judgment "at this early stage." Doc.66, Order, at 21. And these three cases do not illustrate that Petitioners' claims are justiciable.

In *Holder*, the humanitarian groups identified *two* entities they sought to support. 130 S. Ct. at 2717. They did not allege that they had supported a now de-designated terrorist entity in the *past* and might want to support *unnamed* terrorist entities in the future. *Cf. Renne*, 501 U.S. at 321. It was also clearer that the challenged law applied to the groups; indeed, this Court held that it would. *Holder*, 130 S. Ct. at 2717-18. And *Holder* involved a typical criminal statute, not one requiring independent decisions by independent actors before any prosecution could ensue. *See Clapper*, 133 S. Ct. at 1150.

In *American Booksellers*, the booksellers identified sixteen books they currently sold that might be covered by the law. 484 U.S. at 390-91. They did not allege that they had sold those sixteen books in the past and they might someday sell "similar" books in the future. *Cf. Golden*, 394 U.S. at 109. And *American Booksellers* also involved a standard criminal statute where, unlike here, the only thing standing between the booksellers and prosecution was prosecutorial discretion.

In *Babbitt*, while the union (like Petitioners) had not yet been subject to criminal penalties, it had been subjected to more than a prior finding trigger-

ing an investigation. It asserted that "some seven suits [had] been filed against" it and its members under various provisions of the challenged law, and "that as a result speech activities have been enjoined including handbilling and oral conversations on three occasions by an ex parte temporary restraining order without notice or hearing." *United Farm Workers Nat'l Union v. Babbitt*, 449 F. Supp. 449, 452 (D. Ariz. 1978); *see also Babbitt*, 442 U.S. at 302 n.13 (noting that the prospect of a court-ordered injunction "provides substantial additional support for the conclusion that [union's] challenge to the publicity provision is justiciable"). Here, no government agent ever prevented Petitioners from speaking. JA108. Further, unlike Petitioners, the union alleged that it would inevitably make honest misstatements that it believed would violate the law. 442 U.S. at 301, 303.

Petitioners also ignore the big picture. In *Babbitt* and *American Booksellers*, the Court *declined* to resolve most of the challenges. *Babbitt* abstained from adjudicating the challenge to the consumer-publicity statute given the uncertainty in state law. 442 U.S. at 306-12. *American Booksellers* certified state-law issues to state court. 484 U.S. at 393-98. These results support dismissal here for similar fitness reasons. *Holder*, by contrast, involved federal law, and did not present the same "issues of federalism." *MedImmune*, 549 U.S. at 134 n.12. The Court, moreover, resolved a *statutory* question ahead of *constitutional* ones; it did not leap to the broadest constitutional question. *Holder*, 130 S. Ct. at 2717-18.

c. Petitioners also argue (at 44-49) that the false-statement laws' unique structure makes threatened enforcement more likely. Because anyone can file complaints with the Commission, there are "millions" of prosecutors waiting to enforce the laws. But these individuals do not enforce laws; the enforcement decision remains with the prosecutor. *Pestrak*, 926 F.2d at 578. Further, the prosecutor's discretion gets triggered only if the *Commission* agrees with a complainant and believes the case should be referred to a prosecutor. And the state *courts* can reject the Commission's finding. A process designed to screen away enforcement does not make it more likely. *See Common Cause*, 806 N.E.2d at 1059.

Recognizing the speculative nature of enforcement, Petitioners turn (at 47-49) to different alleged injuries—the "financial, political, and disclosure burdens imposed by" Commission proceedings. They argue (at 47-48) that the Court has allowed challenges not just to criminal laws but also to laws "restricting bar membership, threatening discharge from public employment, and burdening receipt of certain mail." But the injuries had happened in the referenced cases. The litigants "ha[d] been *denied* admission to the bar, *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), or *discharged* from state employment, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), or *denied* the delivery of mail, *Lamont v. Postmaster General*, 381 U.S. 301 (1965)." *United Presbyterian*, 738 F.2d at 1378 (emphases added). Regardless, this type of threatened injury is not sufficiently alleged for the reasons already explained. *See* Part II.A.2.

Lastly, citing *Meese v. Keene*, 481 U.S. 465 (1987), Petitioners argue (at 49) that a falsity finding could create reputational injuries as well. But *Meese* found standing because "the plaintiff in that case was *unquestionably* regulated by the relevant statute, and the films that he wished to exhibit had *already* been labeled as 'political propaganda.'" *Clapper*, 133 S. Ct. at 1153 (emphases added). To make that case like this one, Petitioners would have needed to allege that the Commission had *already* found their statements false. But, as noted, no such thing occurred, and their speech is not "unquestionably" regulated by the challenged laws. Pet.App.12a. And this threatened injury, too, is just as speculative as the threatened discovery burdens. *See* Part II.A.2.

B. Petitioners' Prudential Arguments Overlook Important Considerations

With respect to prudential ripeness, Petitioners argue (at 28-29) that their claims are "fit" because they assert that the false-statement laws are invalid on their face, present legal questions, and do not depend on facts. But Petitioners also made as-applied claims, and their facial claims hinge on state-law questions. If they seek to alter the nature of their claims now, such a change itself contravenes the requirement "for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions." *Rescue Army*, 331 U.S. at 568. Their facial claims are anything but clear.

Regardless, Petitioners' arguments do not prove the fitness of their facial claims. Justice Brandeis certainly would disagree that a purely "legal" challenge of the type Petitioners envision is fit for review.

It violates two of his cardinal principles—not to reach constitutional questions ahead of statutory ones or to decide broad constitutional questions ahead of narrow ones. *Ashwander*, 297 U.S. at 347; *see also Nat'l Park*, 538 U.S. at 807 (noting that the Court called for ripeness briefing "[b]ecause petitioner has brought a facial challenge"); *Renne*, 501 U.S. at 324 (noting that "even if one may read the complaint to assert a facial challenge, the better course might have been to address in the first instance the constitutionality of [the law] as applied").

None of Petitioners' cases rejects these principles. The ripeness analysis in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), concerned a question "of statutory interpretation." *Id.* at 479. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), raised a preemption question. *Id.* at 201. And while *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), did decide a constitutional question, it did not identify any unexhausted grounds before reaching the question, and it involved a federal statute. *Id.* at 81-82. Finally, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), resolved a constitutional claim only after the litigant had gone through the ripening process this Court's prior decision directed. *Id.* at 580-81 (discussing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984)).

Beyond case law, something is intuitively wrong with the notion that the broadest, most consequential attacks on democratically passed laws should be the easiest to bring. That view flips cardinal rules of

judicial restraint on their head. "[I]f it is not necessary to decide more, it is necessary not to decide more," *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring), except, apparently, when it comes to ripeness—where a case will be fit to decide more if plaintiffs make it unfit to decide less. To the contrary, that the narrower claims are premature can also establish that the broader ones are as well. *See Renne*, 501 U.S. at 324.

As to hardship, Petitioners claim (at 29) that they will suffer the classic case of having to choose between staying silent or risking prosecution. But this hardship was not looming when they amended their complaints, *see* R.C. 3517.21(B), and, before any future election, they could have opted for the "relatively riskless controversy-ripening tool" of an advisory opinion, *Martin Tractor*, 627 F.2d at 388.

More broadly, Petitioners claim hardship (at 40, 56) in an alleged inability to obtain judicial review. In the state system, they assert (*id.*), complainants obtain probable-cause findings and then delay and dismiss proceedings after elections. But any delay typically arises from the *consent* of both sides. Ohio Admin. Code 3517-1-06(B)(1). And any dismissal, which is typically *unopposed*, requires the Commission's permission. R.C. 3517.157(B)(1). Here, SBA and Driehaus "first jointly postponed the hearing and then voluntarily agreed to dismissal." Pet.App.27a. By doing so, SBA "agreed to forego its 'meaningful remedy' with the Commission," Pet.App.31a, which could have led to state-court review of adverse findings. *See Ruhrgas AG v. Mara-*

thon Oil Co., 526 U.S. 574, 586 (1999) ("[F]ederal and state courts are complementary systems for administering justice in our Nation.").

In the federal system, Petitioners assert (at 40, 56), the Sixth Circuit's analysis bars all review of the false-statement laws. But simply because that court did not let *Petitioners* proceed does not mean it prohibits *everyone* from doing so. After all, its prior decisions all but eliminated the Commission's enforcement powers, *Pestrak*, 926 F.2d at 578, and also permitted an as-applied challenge, *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 494 (6th Cir. 1995). In all events, Petitioners overlook a "more basic consideration" in suggesting that litigants have a broad right to bring federal pre-enforcement suits seeking to enjoin state laws. *Younger*, 401 U.S. at 52. "Procedures for testing the constitutionality of a statute 'on its face' . . . , and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan." *Id.* The Sixth Circuit was entirely correct in exercising "[a] maximum of caution" when considering the type of far-reaching litigation that Petitioners seek to bring in federal court against Ohio's laws. *Wycoff*, 344 U.S. at 243.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
PETER K. GLENN-APPLEGATE
Deputy Solicitors
30 East Broad St., 17th Floor
Columbus, OH 43215
614-466-8980
eric.murphy
@ohioattorneygeneral.gov

Counsel for State Respondents Kimberly Allison, Degee Wilhelm, Helen Balcolm, Terrance Conroy, Lynn Grimshaw, Jayme Smoot, William Vasil, Philip Richter, Ohio Elections Commission, and Jon Husted

MARCH 26, 2014

APPENDIX

1. R.C. 3517.153.

(A) Upon the filing of a complaint with the Ohio elections commission, which shall be made by affidavit of any person, on personal knowledge, and subject to the penalties for perjury, or upon the filing of a complaint made by the secretary of state or an official at the board of elections, setting forth a failure to comply with or a violation of any provision in sections 3517.08 to 3517.13, 3517.17, 3517.18, 3517.20 to 3517.22, 3599.03, or 3599.031 of the Revised Code, the commission shall proceed in accordance with sections 3517.154 to 3517.157 of the Revised Code.

(B) The commission shall prescribe the form for complaints made under division (A) of this section. The secretary of state and boards of elections shall furnish the information that the commission requests. The commission or a member of the commission may administer oaths, and the commission may issue subpoenas to any person in the state compelling the attendance of witnesses and the production of relevant papers, books, accounts, and reports. Section 101.42 of the Revised Code governs the issuance of subpoenas insofar as applicable. Upon the refusal of any person to obey a subpoena or to be sworn or to answer as a witness, the commission may apply to the court of common pleas of Franklin county under section 2705.03 of the Revised Code. The court shall hold proceedings in accordance with Chapter 2705. Of the Revised Code.

(C) No prosecution shall commence for a violation of a provision in sections 3517.08 to 3517.13, 3517.17, 3517.18, 3517.20 to 3517.22, 3599.03, or

3599.031 of the Revised Code unless a complaint has been filed with the commission under this section and all proceedings of the commission or a panel of the commission, as appropriate, under sections 3517.154 to 3517.157 of the Revised Code are completed.

(D) The commission may recommend legislation and render advisory opinions concerning sections 3517.08, 3517.082, 3517.092, 3517.102, 3517.105, 3517.1014, 3517.13, 3517.18, 3517.20 to 3517.22, 3599.03, and 3599.031 of the Revised Code for persons over whose acts it has or may have jurisdiction. When the commission renders an advisory opinion relating to a specific set of circumstances involving any of those sections stating that there is no violation of a provision in those sections, the person to whom the opinion is directed or a person who is similarly situated may reasonably rely on the opinion and is immune from criminal prosecution and a civil action, including, without limitation, a civil action for removal from public office or employment, based on facts and circumstances covered by the opinion.

(E) The commission shall establish a web site on which it shall post, at a minimum, all decisions and advisory opinions issued by the commission and copies of each election law as it is amended by the general assembly. The commission shall update the web site regularly to reflect any changes to those decisions and advisory opinions and any new decisions and advisory opinions.

2. R.C. 3517.155.

(A)

(1) Except as otherwise provided in division (B) of this section, the Ohio elections commission shall hold its first hearing on a complaint filed with it, other than a complaint that receives an expedited hearing under section 3517.156 of the Revised Code, not later than ninety business days after the complaint is filed unless the commission has good cause to hold the hearing after that time, in which case it shall hold the hearing not later than one hundred eighty business days after the complaint is filed. At the hearing, the commission shall determine whether or not the failure to act or the violation alleged in the complaint has occurred and shall do only one of the following, except as otherwise provided in division (B) of this section or in division (B) of section 3517.151 of the Revised Code:

(a) Enter a finding that good cause has been shown not to impose a fine or not to refer the matter to the appropriate prosecutor;

(b) Impose a fine under section 3517.993 of the Revised Code;

(c) Refer the matter to the appropriate prosecutor;

(2) As used in division (A) of this section, "appropriate prosecutor" means a prosecutor as defined in section 2935.01 of the Revised Code and either of the following:

(a) In the case of a failure to comply with or a violation of law involving a campaign committee or the committee's candidate, a political party, a legislative campaign fund, a political action committee, or a po-

litical contributing entity, that is required to file a statement of contributions and expenditures with the secretary of state under division (A) of section 3517.11 of the Revised Code, the prosecutor of Franklin county;

(b) In the case of a failure to comply with or a violation of law involving any other campaign committee or committee's candidate, or any other political party, political action committee, or political contributing entity either of the following as determined by the commission:

(i) The prosecutor of Franklin county;

(ii) The prosecutor of the county in which the candidacy or ballot question or issue is submitted to the electors or, if it is submitted in more than one county, the most populous of those counties.

(B) If the commission decides that the evidence is insufficient for it to determine whether or not the failure to act or the violation alleged in the complaint has occurred, the commission, by the affirmative vote of five members, may request that an investigatory attorney investigate the complaint. Upon that request, an investigatory attorney shall make an investigation in order to produce sufficient evidence for the commission to decide the matter. If the commission requests an investigation under this division, for good cause shown by the investigatory attorney, the commission may extend by sixty days the deadline for holding its first hearing on the complaint as required in division (A) of this section.

(C) The commission shall take one of the actions required under division (A) of this section not later

than thirty days after the close of all the evidence presented.

(D)(1) The commission shall make any finding of a failure to comply with or a violation of law in regard to a complaint that alleges a violation of division (A) or (B) of section 3517.21, or division (A) or (B) of section 3517.22 of the Revised Code by clear and convincing evidence. The commission shall make any finding of a failure to comply with or a violation of law in regard to any other complaint by a preponderance of the evidence.

(2) If the commission finds a violation of division (B) of section 3517.21 or division (B) of section 3517.22 of the Revised Code, it shall refer the matter to the appropriate prosecutor under division (A)(1)(c) of this section and shall not impose a fine under division (A)(1)(b) of this section or section 3517.993 of the Revised Code.

(E) In an action before the commission or a panel of the commission, if the allegations of the complainant are not proved, and the commission takes the action described in division (A)(1)(a) of this section or a panel of the commission takes the action described in division (C)(1) of section 3517.156 of the Revised Code, the commission or a panel of the commission may find that the complaint is frivolous, and, if the commission or panel so finds, the commission shall order the complainant to pay reasonable attorney's fees and to pay the costs of the commission or panel as determined by a majority of the members of the commission. The costs paid to the commission or panel under this division shall be deposited into the Ohio elections commission fund.

3. R.C. 3517.156.

(A) If a complaint filed with the Ohio elections commission is to receive an expedited hearing pursuant to section 3517.154 of the Revised Code, a panel of at least three members of the commission shall hold a hearing on the complaint to determine whether there is probable cause to refer the matter to the full commission for a hearing under section 3517.155 of the Revised Code. Not more than one-half of the members of a panel shall be affiliated with the same political party. The chairperson of the commission shall call for the selection of a panel, as needed, and shall select the members of the panel by lot.

(B)(1) Except as otherwise provided in section 3517.154 of the Revised Code and divisions (B)(2) and (3) of this section, the panel shall hold one expedited hearing on a complaint forwarded to it by the commission for an expedited hearing in accordance with this division. If a complaint is filed on or after the sixtieth day prior to a primary or special election or on or after the ninetieth day prior to the general election, but not later than the day of the primary, special, or general election to which the complaint relates, the hearing shall be held not later than two business days after the determination required to be made under division (A) of section 3517.154 of the Revised Code is made, unless the panel has good cause to hold the hearing after that time, in which case it shall hold the hearing not later than seven business days after that determination is made. All members of the panel shall be present before any official action may be taken, and a majority vote of the panel is required for any official action.

(2) The commission shall hold a hearing on a complaint that is filed prior to the periods of time specified in division (B)(1) of this section, or filed after the date of the election to which the complaint relates, at the times specified for hearing complaints in section 3517.155 of the Revised Code.

(3) The deadlines provided for in division (B)(1) of this section may be extended by agreement of all parties to the complaint but shall not be extended beyond the deadlines provided for in division (A) of section 3517.155 of the Revised Code.

(C) At the expedited hearing held under division (B)(1) of this section, the panel shall make only one of the following determinations:

(1) There is no probable cause to believe that the failure to comply with or the violation of a law alleged in the complaint has occurred. If the panel so determines, it shall dismiss the complaint.

(2) There is probable cause to believe that the failure to comply with or the violation of a law alleged in the complaint has occurred. If the panel so determines, it shall refer the complaint to the full commission, and the commission shall hold a hearing on the complaint under section 3517.155 of the Revised Code not later than ten days after the complaint is referred to it by the panel.

(3) The evidence is insufficient for the panel to make a determination under division (C)(1) or (2) of this section and further investigation of the complaint is necessary. If the panel so determines, it immediately shall request that an investigatory attorney investigate the complaint, and an investigato-

ry attorney shall make an investigation in order to produce sufficient evidence upon which to decide the matter. If the panel requests that an investigatory attorney make an investigation, the complaint shall be referred to the full commission, and the commission shall hold a hearing on the complaint under section 3517.155 of the Revised Code.

(D) No panel of the commission shall impose a fine.

(E) If the panel dismisses the complaint under division (C)(1) of this section, the person who made the complaint may petition the full commission to reconsider the dismissal at a hearing under section 3517.155 of the Revised Code. A petition for reconsideration shall be filed not later than two business days after the dismissal of the complaint. The commission shall render its decision on the petition not later than three business days after receiving the petition. If the petition for reconsideration is granted, the commission shall hold a hearing on the complaint under section 3517.155 of the Revised Code not later than five business days after granting the petition.

If the petition for reconsideration is not granted, the commission shall order the person who filed the complaint to pay reasonable attorney's fees and to pay the costs of the panel that dismissed the complaint as determined by a majority of the members of the commission. The costs paid to the commission under this division shall be deposited into the Ohio elections commission fund.

(F) As used in this section, "expedited hearing" includes an automatic expedited hearing as prescribed in section 3517.154 of the Revised Code.

4. R.C. 3517.157

(A) A complaint shall be filed with the Ohio elections commission within two years after the occurrence of the act or failure to act that is the subject of the complaint, except that if the act or failure to act involves fraud, concealment, or misrepresentation and was not discovered during that two-year period, a complaint may be filed within one year after discovery of such act or failure to act.

(B) Whoever files a complaint with the commission under section 3517.153 of the Revised Code may withdraw it at the following times:

(1) If the complaint receives an expedited hearing under section 3517.156 of the Revised Code, at any time prior to the hearing without the permission of the commission, or at any time after the hearing begins but only with the permission of the commission;

(2) If the complaint does not receive an expedited hearing, at any time.

(C) The commission may dismiss a complaint pending before it or before a panel of the commission.

(D) The commission or a panel of the commission shall conduct hearings in accordance with Chapter 119. of the Revised Code and the Rules of Civil Procedure, except as they are inconsistent with rules adopted by the commission. A party adversely affected by a final determination of the commission may appeal from the determination under section 119.12 of the Revised Code.

(E) The privilege granted to an attorney under section 2317.02 of the Revised Code shall be granted

to the full-time attorney employed by the commission under division (H)(2) of section 3517.152 of the Revised Code, and the commission or a panel of the commission shall be considered the client of that attorney for purposes of that privilege.

(F) The members of the commission shall not do either of the following except at a meeting of the commission subject to section 121.22 of the Revised Code:

(1) Discuss among themselves a complaint pending before the commission or a panel of the commission;

(2) Discuss a complaint pending before the commission or a panel of the commission with a party to the complaint, an attorney representing a party to the complaint, or an investigatory attorney of the commission.

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
APR 9 - 2014
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No. 13-193

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF

CHRISTOPHER P. FINNEY
THE FINNEY LAW FIRM
4270 Ivy Pointe Blvd.
Cincinnati, OH 45245

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Ct.
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan St.
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

DAVID R. LANGDON
JOSHUA B. BOLINGER
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

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INTRODUCTION

The parties agree that a concrete "case" or "controversy" within the meaning of Article III arises when a plaintiff faces a "credible threat" of being penalized for constitutionally protected speech. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The issue before this Court is whether petitioners have satisfied that test.

They plainly have. Existence of a credible threat requires predicting how two actors will behave in the future—the *speaker* and the *state*. As to the former, petitioners alleged that they want to engage in the *same* speech in future elections as SBA had during the 2010 campaign, not necessarily regarding Rep. Driehaus but regarding many other Ohio candidates who had supported the ACA and its abortion funding. At least at the pleading stage, that more than suffices, particularly because federal elections recur every two years and petitioners are advocacy groups whose mission is to pursue these critiques. As to the state, the Commission in 2010 found probable cause that SBA's statements were criminal—a view from which it has never retreated, even in this litigation.

The Commission seeks to deny the self-evident threat that petitioners face by stringing together a series of implausible hypotheticals under which petitioners might avoid further enforcement or final conviction. With respect to OEC enforcement, *maybe* the Ohio Secretary of State will ignore his statutory duty to report suspected violations (though he has never disavowed that role), and *maybe* nobody in the entire State of Ohio will file a complaint with the Commission (notwithstanding the latter's probable-cause finding and the immense benefits of unleashing

"truth police" on an adversary). With respect to final OEC adjudication, *maybe* the Commission will reverse its "preliminary" view that describing the ACA as taxpayer-funded abortion is a crime in Ohio (though it has given no such indication, even in the face of this litigation). With respect to criminal prosecution, *maybe* a prosecutor will in his discretion decline to pursue charges (even though they have been referred by the agency designated to adjudicate election-law violations). And *maybe*, after petitioners incur the burdens—financial, political, reputational—of being dragged through this intrusive process in the middle of a campaign, a state court will hold, several years later, that the Commission erred (though most complainants abandon the process after the election).

In short, even *after* a speaker has been subjected to prior enforcement that found a probable violation, the Commission contends that there is no "credible threat" unless the speaker eliminates every conceivable hypothetical under which state actors ignore their own laws. But Article III does not require, and the First Amendment cannot tolerate, such a Sisyphean burden on speakers.

The Commission's contrary view is at war with this Court's consistent admonition that the law does not force speakers to a Hobson's Choice of either engaging in core political speech and risking prosecution, or engaging in "self-censorship" that profoundly diminishes free political debate. Rather, a credible *threat* suffices, because that threat visits the cognizable harm required by Article III and because the only alternative is to force citizens to seriously jeopardize their freedom in order to obtain adjudication of their constitutional rights. Indeed,

the Commission's rule would result here in denying *any* pre-enforcement challenge to an unconstitutional restriction on core political speech.

ARGUMENT

I. PETITIONERS SUFFICIENTLY ALLEGED AN INTENT TO ENGAGE IN SPEECH ARGUABLY PROSCRIBED BY THE STATUTE.

Petitioners alleged that they will repeat "the same or similar statements" as those found to probably violate Ohio law, "about other federal candidates who voted for ObamaCare, as well as about candidates in local or state elections who either voted to support or voiced support of ObamaCare." JA149 (COAST); *see also* JA122 (SBA intent to engage in "substantially similar activity"). Raising an argument that not even the Sixth Circuit invoked, the Commission says that these allegations are not sufficiently "concrete" or "imminent." It also defends the Sixth Circuit's rule that petitioners' suit is precluded because petitioners do not agree that their intended speech is false. Those objections fail.

A. The Commission argues that no dispute can be justiciable unless petitioners identified in their complaints the "particular candidate" they planned to criticize and the "precise language" they planned to use. (Opp.34.) There is no such arbitrary rule.

First, this case was dismissed on the pleadings, at which point "general factual allegations of injury ... may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). That alone distinguishes all of

the cases the Commission cites, including *Lujan* (a summary judgment case) and *Golden v. Zwickler*, 394 U.S. 103, 107 (1969), and *Renne v. Geary*, 501 U.S. 312 (1991) (both of which reached final judgments). As *Lujan* explained, the need for "specific facts" to prove standing arises only at "successive stages of the litigation." 504 U.S. at 561.

Contrary to the Commission's claim (Opp.35), this Court did not overrule *Lujan* when it held in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that the facts pleaded in a complaint must be "plausible" to present a viable claim. The plausibility rule does not mean that "detailed factual allegations" are necessary. *Id.* at 678. All it means is that the court need not accept "legal conclusions" as true and may use its "common sense" to determine whether well-pleaded facts show a plausible claim to relief. *Id.* at 678-79.

Here, "common sense" confirms the inherent plausibility of petitioners' assertion that they will repeat similar statements in the future. Petitioners are *advocacy groups*; their mission is to educate voters about issues like the ACA's taxpayer funding for abortion. (SBA's specific focus is abortion.) So it is obvious that they would continue to repeat that message. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1002 (9th Cir. 2010) (because plaintiff is "politically active organization that has been heavily involved in public debates about pro-life issues," there is a "reasonable expectation that [it] will face ... enforcement ... again").

The Commission emphasizes that Driehaus is no longer a candidate for political office. (Opp.33.) But Driehaus is hardly the only candidate to vote for the ACA. Indeed, SBA's original "false statement" also

criticized *another* Member of Congress from Ohio, Marcy Kaptur. JA52. Rep. Kaptur ran for reelection in 2012 and is running once again in 2014. Senator Sherrod Brown, another ACA supporter, was also on the ballot in Ohio in 2012—as was the President.

Whether *Driehaus* runs for Congress again is therefore irrelevant. Petitioners do not care about *Driehaus*; they care about *the ACA's abortion funding*, which remains politically salient. Petitioners' allegation that they want to repeat the speech about others is therefore plainly plausible. This contrasts starkly with *Golden*, where the pamphlet at issue addressed particular remarks by a particular Congressman. 394 U.S. at 105 n.2. The Court concluded that the plaintiff's "*sole concern* was literature relating to the Congressman and his record." *Id.* at 109 (emphasis added). No such conclusion can be drawn here.[1]

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[1] The Commission also cites *Renne*, but the Court there identified a host of justiciability defects not present here. *First*, the challenged provision prohibited party endorsements in non-partisan elections, but the plaintiffs were *voters*, not parties or even candidates. 501 U.S. at 319-20. *Second*, the only means of enforcing the prohibition was deleting the party endorsements from candidates' statements in official voter guides. *Id.* at 322. But there was no evidence that a candidate wanted to include such an endorsement in his statement. *Id.* at 321. *Third*, a distinct statute, not challenged, anyway restricted mention of partisan activities in candidate statements. *Id.* at 319. *Fourth*, the Court "doubt[ed]" that the plaintiffs had properly pleaded a facial challenge. *Id.* at 323. But "[i]f such a challenge had been brought by a political party ... , and if the complaint had alleged that these organizations wanted to endorse, support, or oppose a candidate for nonpartisan office but were inhibited from doing so because of the constitutional provision, the case would unquestionably be ripe." *Id.* at 325 (Stevens, J., concurring).

Nor is there any relevant doubt over the "precise language" that petitioners intend to use. (Opp.36.) First, it is extraordinarily precise: COAST alleged an intent to make "the same or similar statements" as SBA had. JA149. Second, while "precise language" might sometimes matter, *Renne*, 501 U.S. at 322, it did not matter to the Commission—which in finding probable cause did not distinguish between any of SBA's various statements linking the ACA to abortion funding. JA49-50, 37, 73. Petitioners thus face a credible threat *regardless* of "precisely" how they formulate their ACA message.

Indistinguishable precedent plainly establishes the sufficiency of these allegations. In *Babbitt*, the unions did not specify language they would use to criticize a specific company, but it nonetheless sufficed that they alleged intent "to engage in boycott activities," including "consumer publicity" campaigns covered by the law prohibiting "dishonest, untruthful and deceptive publicity." 442 U.S. at 301. Even though the unions did not allege intent to "propagate" the proscribed "untruths," its suit "plainly pose[d] an actual case or controversy," as "erroneous statement is inevitable in free debate." *Id.*

Similarly, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), the plaintiff's past advertisement criticized two Senators, but it did not allege an intent to refer to those specific candidates or any other particular candidates by name in future advertisements, much less during the law's "blackout period." It sufficed that the organization said it "planned on running 'materially similar'" ads in the future. *Id.* at 463. As the Court explained, it is impractical "in the context of election cases" to

demand greater "specificity." *Id.* In short, "[h]istory repeats itself, but not at the level of specificity demanded by the [Commission.]" *Id.*[2]

The Commission observes that the plaintiffs in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), identified the entities they sought to assist, and in *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988), identified the books they believed "might" be covered by the challenged law. (Opp. 53.) But in neither case did the Court mention those facts in its discussion of justiciability, so they could hardly have been critical.

B. The Commission also argues that petitioners' allegations of intent to repeat SBA's speech are not *imminent*. (Opp.17, 34.) But this is nothing like the allegation in *Lujan* that the plaintiffs intended "some day" to visit endangered species' habitats, 504 U.S. at 564—petitioners here had already been injured by the Ohio law and would be injured again at the next, regularly scheduled election. While an election *six years* off may be "too remote temporally," *McConnell v. FEC*, 540 U.S. 93, 226 (2003), in this case the next election was less than two years away.

Since, as this case vividly illustrates, it takes at least two years to resolve election speech cases, any rule deeming two years "premature" would inevitably ensure that adjudication cannot timely occur before the next election. *WRTL*, 551 U.S. at 462 (rejecting FEC position that "2-year window between elections

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[2] *Wisconsin Right to Life* addressed mootness rather than ripeness, but both doctrines require the plaintiff to prove that the injury will recur, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), and so its principles apply equally here.

provides ample time ... to litigate"). Why establish unrealistic ripeness rules only to create avoidable mootness issues that, in turn, trigger the "capable of repetition yet evading review" exception?

C. The Commission also defends the Sixth Circuit's holding that petitioners' claims are barred because they believe their speech is true. (Opp.39, 48.) But the Commission never explains *why* this "preemptive confession" is needed for justiciability or responds to petitioners' points on why it is irrelevant. As explained, the credible-threat test looks to how the *speaker* will act and how the *state* will react. The speakers have *alleged* how they plan to act, and their subjective views about the legality of their speech are irrelevant to predicting how the *state* will respond.

If plaintiffs must "confess" to get into court, that would as a practical matter foreclose pre-enforcement challenges to the false-statement law, even though its constitutional flaw is precisely that it "present[s] a grave and unacceptable danger of suppressing truthful speech." *United States v. Alvarez*, 132 S. Ct. 2537, 2564 (2012) (Alito, J., dissenting). Indeed, this rule would block challenges to the most vague and open-ended laws—*i.e.*, the most constitutionally troubling ones. (Petrs.Br.32-34.) This is why *Babbitt* conclusively held that, even in the commercial-speech context where the state *may* proscribe "false" speech, a plaintiff may challenge such a ban even when it specifically *disavows* any intent to "propagate untruths." 442 U.S. at 301; *see also Holder*, 130 S. Ct. at 2717 (plaintiffs urged Court to hold that statute did *not* encompass their intended speech, thereby resolving case "without reaching any issues of constitutional law," but challenge was still

"suitable for judicial review"); *Booksellers*, 484 U.S. at 390-91, 393 (plaintiffs argued that law "*might* apply to as much as one half of their inventory," but still had "actual and well-founded fear that the law will be enforced against them" (emphasis added)).

In short, "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298. That test is satisfied if the law "arguably" proscribes his speech in the view of the *enforcement authorities*, regardless whether the speaker *agrees*.

II. PETITIONERS FACE A "CREDIBLE THREAT" OF BEING PENALIZED FOR THEIR SPEECH.

The above demonstrates that petitioners have sufficiently alleged their own intended conduct. The other relevant question is whether it is "credible" to expect that petitioners will be penalized if they proceed with those plans. The Commission contends that no credible threat exists because, supposedly, even if petitioners repeat their speech, there are many hurdles that would necessarily precede any criminal prosecution. (Opp.36.) There are three flaws in that argument. *First*, it erroneously focuses exclusively on *criminal* prosecution as the relevant harm, but the Commission's civil enforcement process imposes serious burdens on core political speech that on their own constitute cognizable injury. *Second*, as to criminal prosecution, the Commission wrongly places the burden of uncertainty on the *speakers*, imposing precisely the dilemma and self-censorship that pre-enforcement review is meant to resolve. *Third*, the Commission overstates both the *number* of steps before prosecution and the *plausibility* of each.

A. At the threshold, the Commission errs by exclusively focusing on the harm caused by criminal prosecution, ignoring the harms imposed through the OEC *process*. Just as *prosecution* causes injury even if it does not result in *conviction*, an OEC proceeding causes injury even if it does not result in a final judgment or penalty. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 625 n.1 (1986) (dispute ripe even though "administrative body may rule ... in [School's] favor," because "it was equally true that the plaintiffs in *Steffel* ... may have prevailed had they in fact been prosecuted"). The point is that the process itself causes independently cognizable harms, namely "embarrassment, expense and ordeal." *Yeager v. United States*, 557 U.S. 110, 117-18 (2009).

The burdens imposed by the mere filing of a false-statement complaint are detailed in the *amicus* brief of Ohio's Attorney General. Whenever a complaint is filed, a probable-cause hearing must be held; there is "no system for weeding out frivolous complaints." Amicus Br. of Ohio Atty. Gen. at 6. Speakers are thus "forced to devote time, resources, and energy" to defending their speech, "typically in the late stages of a campaign." *Id.* The probable-cause hearings are also "by law, public," and become a media circus. *Id.* at 12. Complaints can thus easily "be manipulated ... so that the costs they impose on a political opponent form part of the complainant's campaign strategy." *Id.* at 5. Most obviously, where, as here, probable cause is found, the political impact "can be profound," as such a finding "is perceived ... as the definitive pronouncement of the State of Ohio as to a ... speaker's truthfulness." *Id.* at 6. And burdensome discovery then ensues. *See id.* at 10.

All of these burdens are cognizable injuries. *See WRTL*, 551 U.S. at 468 n.5 ("[L]itigation constitutes a severe burden on political speech."); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988) (forcing speaker to "bear the costs of litigation" will "chill speech"); *Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (political harm from government label is "cognizable injury"); *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) ("[D]isclosure requirements may burden the ability to speak ....").[3]

The Commission does not dispute that burdens short of criminal prosecution count as injuries. But it argues that such harms must have already "happened" before a plaintiff can sue. (Opp.55.) Not so. A speaker need not expose itself to non-criminal sanctions any more than to criminal prosecution. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 551 (1973) (pre-enforcement challenge where threatened penalty was loss of job); *Riley*, 487 U.S. at 793-94 (pre-enforcement challenge to law restricting charitable solicitations where threatened burden was being forced to "bear the costs of litigation" over how solicited donations were used). It is therefore enough that petitioners face a "credible threat" of being subjected to the financial, political, and disclosure harms of an OEC proceeding.

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[3] The Commission advises petitioners to ask it to limit discovery (Opp.38), but cites no cases where it has limited discovery into directly relevant facts (*e.g.*, all of the speaker's private communications to assess "reckless disregard" for truth). It also claims that no political harm exists absent a final finding of falsity (Opp.56), but common sense and Ohio's Attorney General say the opposite—that a probable-cause finding alone imposes "profound" harm. Amicus Br. of Ohio Atty. Gen. at 6.

B. As to criminal prosecution, the Commission exaggerates the degree of certainty that is needed. In *Babbitt*, it sufficed that "the State has not disavowed any intention of invoking the criminal penalty provision." 442 U.S. at 302. In *Holder*, it sufficed that "[t]he Government has not argued to this Court that plaintiffs will not be prosecuted." 130 S. Ct. at 2717. And in *Booksellers*, the *only* factor mentioned was that "[t]he State has not suggested that the ... law will not be enforced." 484 U.S. at 393. This presumption makes sense, because laws are not suggestion boxes. They are binding rules that regulate citizens' speech and which state officials have sworn to faithfully execute. Thus, absent affirmative disavowal, there is no basis to think the law will not be enforced, and indulging that counterintuitive assumption imposes an immediate, objective burden on speech—the risk of prosecution.

The Commission's supposedly contrary cases foundered for other reasons, not doubt over whether prosecutors would prosecute. (Opp.47-48.) In *Golden*, the problem was that the Congressman who was the plaintiff's "sole concern" was not running again. 394 U.S. at 109; *see also McCollester v. City of Keene, N.H.*, 668 F.2d 617, 620 (1st Cir. 1982) (complaint "inadequate" because "it fails to allege the conduct in which the plaintiff intends to engage"). And *Renne* presented numerous obstacles, having nothing to do with uncertainty over whether state enforcers would do their job. *See supra* n.1.[4]

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[4] The Commission also relies on *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), but the lack of justiciability there had nothing to do with the likelihood of

The Commission also cites *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), to argue that any doubt about prosecution precludes suit. (Opp.47.) But *Clapper* clarified that its "certainly impending" test does not require harm to be "literally certain"; a "substantial risk" suffices. 133 S. Ct. at 1150 n.5. Moreover, *Clapper* did not involve a law proscribing speech, and there was no assertion that the plaintiffs arguably *violated* the law. *Id.* at 1153. Rather, the law merely *authorized surveillance*, *see id.* at 1149, and so the presumption that prosecutors typically enforce criminal prohibitions did not apply. *Accord* Amicus Br. of United States at 9, 13-15.

More fundamentally, the reason that Article III allows pre-enforcement challenges to laws restricting speech is because *credibly threatened* prosecution, not just actual prosecution, inflicts serious injury. If the law required speakers to "expose [themselves] to actual arrest or prosecution," *Steffel*, 415 U.S. at 459, that would cause "self-censorship; a harm that can be realized even without an actual prosecution,"

(continued...)

prosecution; it stemmed from the plaintiffs' failure (unlike here) to set forth the "contents" of statements or the "kinds of political activity" they wanted to engage in. *Id.* at 90. Anyway, *Mitchell* long predates adoption of the rule that a plaintiff need not "expose himself to actual arrest or prosecution to be entitled to challenge a statute." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Under that standard, which even the Commission accepts, justiciability is clear, as shown by the Court's merits resolution of a constitutional challenge to the *same* statute at issue in *Mitchell* by plaintiffs who alleged only that they were chilled by the statute from engaging in political activity. *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 551-53.

Booksellers, 484 U.S. at 393. By requiring speakers to definitively disprove the chance of non-prosecution, the Commission is forcing them to expose themselves to precisely the same risk—and thereby inducing self-censorship. *Cf. Schirmer v. Nagode*, 621 F.3d 581, 586-87 (7th Cir. 2010) ("[U]ncertainty is particularly problematic in the realm of free speech, given the danger that vital protected speech will be chilled."). Stated differently, the existence of a (presumptively enforced) law prohibiting speech immediately visits a burden on that speech; future actual prosecution simply exacerbates that injury.

None of this is to say that subjective "chill" alone, without any credible threat of enforcement, creates cognizable injury. *Cf. United Presbyterian Church in the USA v. Reagan*, 738 F.2d 1375, 1378-79 (D.C. Cir. 1984). But "[i]f such a threat exists, then it poses a classic dilemma for an affected party: either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression." *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996). Because the rationale for the credible-threat test is to resolve that dilemma, it makes no sense to adopt a justiciability rule that impractically requires *speakers* to eliminate doubt over whether the *state* will enforce the law. The proper approach, as in this Court's cases, is to shift that burden to the *state*: If it does not disavow enforcement as to the plaintiff's intended speech, the challenge may proceed.

C. The Commission's argument also overstates the number of "steps" preceding criminal prosecution, and downplays the likelihood of these events.

There are actually only three steps preceding a prosecution, not eight. (Opp.36.) A complainant must file a complaint; the OEC must find a violation; and the prosecutor must choose to pursue charges. The Commission counts separately its referral to the prosecutor, but such referral is mandatory if it finds a violation. *See* Ohio Rev. Code § 3517.155(D)(2) (Commission "shall refer the matter to the appropriate prosecutor"). And while a speaker may appeal a Commission's finding to Ohio state courts, doing so does not stay prosecution. (Anyway, judicial review *after* the plaintiff speaks is no better than review after *conviction*; either way, the speaker risks jail if he loses.)

Turning to the three steps that actually precede prosecution, the Commission agrees that the last—a prosecutor's decision to proceed—does not undermine justiciability, because there is *always* the chance for "prosecutorial discretion." (Opp.53.) *Accord Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring). The only relevant doubts are thus whether anyone will file a complaint and whether the OEC will find a violation. As to both, the complete answer is the Commission's probable-cause finding.

The Commission agrees that the Ohio Secretary of State "has a duty to refer violations" to the OEC, but says that because he did not refer SBA's 2010 statements, it is "speculative to assume" that he would do so in the future. (Opp.37.) But, of course, the Secretary's 2010 decision not to refer occurred *before* the OEC's probable-cause finding that SBA's statements were illegal. That obviously says nothing about whether he will or should do so *after* the expert agency made such a determination. Indeed, such a

referral now is quite probable, if not required by law. *See* Ohio Rev. Code § 3501.05(N)(2) (secretary of state "shall" file OEC complaint "whenever [he] has or should have knowledge of ... a violation").

Likewise, *anybody* in Ohio (or elsewhere, for that matter) has the power to file an OEC complaint. Since the Court presumes prosecution by a single government prosecutor subject to ethical and accountability constraints, that presumption is *a fortiori* warranted when millions of unconstrained, politically motivated citizens can do so (with minimal effort or expense). And the fact that the Commission allowed Driehaus' complaint to proceed in 2010 makes such complaints all but inevitable, even if nobody besides Driehaus previously thought that such a complaint was plausible. It is thus not true that "*any* plaintiff" could challenge the Ohio law based on "*any* intended speech." Pet.App.12a. The probable-cause finding sets petitioners apart.[5]

The probable-cause finding is, of course, also the best indicator of how the Commission will adjudicate future complaints. The Commission's sole response is that the finding was only "preliminary." (Opp.40.) But even in *Mitchell*, the Court allowed a challenge by a plaintiff who was the subject of a "preliminary finding" of a Hatch Act violation. 330 U.S. at 92. A

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[5] Citing *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Commission says that petitioners cannot invoke the "statistical probability" that someone will file a complaint. (Opp.37.) But *Summers* concerned the chances that *the plaintiff's members* would take certain action. 555 U.S. at 497-98. It is one thing for a plaintiff to bear the burden of uncertainty about *its own* future actions—but quite another to impose upon it the risks that *others* will act.

preliminary finding still represents the Commission's view of the merits—here, after reviewing Driehaus' complaint, SBA's answer (with detailed affidavits, *e.g.*, JA78-103), and counsel's arguments. The full Commission could disagree, much like a prosecutor could decline to prosecute, but a panel's affirmative probable-cause finding is surely better evidence than mere non-disavowals (as in *Holder* and *Babbitt*).

Further increasing the credibility of the threat, the district court found, in Driehaus' defamation suit, that SBA's statements were false. The Commission disingenuously claims that the court just refused to grant summary judgment (Opp.53), but the opinion clearly held that "[t]he express language of the [ACA] does *not* provide for tax-payer funded abortion. That is a fact, and it is clear on its face." *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 431 (S.D. Ohio 2011).[6]

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[6] The Commission argues that the defamation suit shows why petitioners' injuries are non-redressable: Candidates could bring tort suits even if the false-statement law were invalidated. (Opp.38.) But invalidating a statute that directly *criminalizes* petitioners' speech and subjects them to onerous Commission proceedings would directly redress those injuries, regardless of whether tort law provides a damages remedy to someone who is *personally injured* because the speech *defames* him. Anyway, there are no potential tort damages here because associating a public official with a mainstream policy view (*i.e.*, supporting publicly funded abortions) is not defamatory, as even the district court eventually recognized. *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720, 2013 U.S. Dist. LEXIS 10261 (S.D. Ohio Jan. 25, 2013). Finally, only the candidate could sue for defamation, whereas under the Ohio law *anyone* may file a false-statement complaint; so reducing the pool of complainants "amount[s] to a significant increase in the likelihood" that petitioners' injuries would be redressed. *Utah v. Evans*, 536 U.S. 452, 464 (2002).

Ultimately, the Commission has done nothing to retreat from its articulated position that petitioners' speech was probably criminal. As a defendant in this suit, the Commission could simply have advised the courts that it would *not* treat this speech as a violation. But even in this Court, it has declined to "disavow" enforcement or its probable-cause finding. It should not be permitted to cast doubt on this suit's viability by speculating about its own future actions.

D. All of the above accepts the Commission's premise that petitioners must establish a "future" injury from the Ohio statute. (Opp.33.) But standing turns on the facts at the time the complaint is filed, *Lujan*, 504 U.S. at 569 n.4, and petitioners filed their complaints while Driehaus' OEC action was still pending—when SBA faced *ongoing* enforcement. The OEC's subsequent decision to dismiss triggered the voluntary cessation exception to mootness, and the *Commission* thus bears the burden of proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 189 (2000).

The Commission responds that it is the *amended* complaints that matter. (Opp.52.) But its cases address materially different facts. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the amended complaint was the first pleading to name the viable plaintiffs, so there was nowhere else to look. *Id.* at 49. And *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), held only that a False Claims Act relator who amends his complaint to *remove* a claim cannot rely on the withdrawn claim to establish jurisdiction. *Id.* at 473-74 & n.6.

No case holds that when a plaintiff with standing amends his complaint after factual developments, to allege facts relevant to mootness, he somehow pleads himself out of court. *See KH Outdoor, LLC v. Clay Cnty.*, 482 F.3d 1299, 1303 (11th Cir. 2007) (applying mootness doctrine where plaintiff amended complaint to seek damages after challenged local ordinance was repealed). And any such rule would illogically mean that a plaintiff who maintains his original complaint in the face of altered facts eliminating the immediate threat has a justiciable claim unless the *defendant* proves non-recurrence with *absolute clarity*, but a plaintiff who faithfully alerts the court to changed circumstances must prove that the injury will recur.

III. PRUDENTIAL FACTORS STRONGLY FAVOR PROMPT JUDICIAL REVIEW.

The Commission erroneously contends that, under ripeness doctrine's "prudential" factors, petitioners' claims are not fit for judicial review and petitioners would suffer no hardship from denying review. Actually, prudential factors strongly favor prompt review given the paramount importance of free and open debate during electoral campaigns.

A. The Commission says that petitioners' claims denominated as "as-applied" are better read as facial objections to Ohio's law. (Opp.42.) Petitioners agree: The statute only *applies* to speakers "taking positions on political issues." JA123-24, 153-54. To invalidate it as to such speakers is thus to invalidate it on its face. In any event, petitioners also expressly alleged that the Ohio law violates the First Amendment on its face. JA122-23, 153-54. The question is thus whether those claims—*i.e.*, that the state may not criminalize campaign speech that it deems "false"—

are fit for judicial review. They obviously are, because they present "purely legal" issues and "will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). (*See* Petrs.Br.28-30.)

The Commission argues, however, that these claims are not fit because they supposedly turn on uncertain questions of state law. (Opp.43.) But there is no relevant uncertainty about the statute's scope; it concededly criminalizes "false" political speech, and that is precisely what petitioners allege violates the Constitution. The Commission offers no construction of the law that would avoid the constitutional issue.

The hypothesis that Ohio courts might find, after the fact, that petitioners did not *violate* the facially unconstitutional law (Opp.43-44) is irrelevant to whether the law is facially unconstitutional. And such post-enforcement review does not alleviate the pre-enforcement concrete harm caused by the credible threat of enforcement. A state law criminalizing "unfair criticism" of the incumbent Governor is subject to pre-enforcement challenge regardless whether state courts might ultimately find a plaintiff's particular criticism not "unfair."

The Commission suggests that petitioners should have pursued a true "as-applied" constitutional claim. (Opp.44.) It does not explain what such a challenge would look like, however, and for good reason. The defect in Ohio's false-statement regime—*i.e.*, that it creates a "Ministry of Truth" that chills core political speech, failing strict scrutiny—condemns the law in all its applications. Anyway, petitioners are masters of their own complaints, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987); and while "the broadest,

most consequential attacks" might be hardest to *win* (*cf.* Opp.57), that is no basis for courts to abdicate. *Cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No.12-873, 2014 WL 1168967, at *6 (U.S. Mar. 25, 2014) ("prudential" doctrines are "in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction is 'virtually unflagging'").[7]

B. As to hardship, the Commission's position is that the law's chilling effect on core political speech—a classic form of hardship, *Steffel*, 415 U.S. at 462—is of petitioners' own making, because they should have asked the OEC for an "advisory opinion" allowing their speech (which the Commission has no obligation to render, Ohio Rev. Code § 3517.153(D)). (Opp.45.) But "[t]he First Amendment does not permit laws that force speakers to ... seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324. This "solution" is thus to turn an unconstitutional speech *suppression* into an unconstitutional *prior restraint*. Anyway, the Commission admits this approach would be "infeasible" (Opp.46) before an election.

The Commission also faults SBA for not objecting to Driehaus' motion to withdraw his OEC complaint. (Opp.45, 58.) How that decision to avoid potential

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[7] Below, petitioners also challenged a disclaimer provision (JA126-27, 156-57), and COAST raised preemption and due process claims (JA154-59). Petitioners do not pursue those claims before this Court, however. Nor do they contend that the OEC's procedures are unconstitutional if used to enforce an otherwise constitutional law, only that they exacerbate the First Amendment chill posed by the law's substantive prohibition.

prosecution in 2010 eliminates the threat of hardship in 2012 or 2014 escapes petitioners. Petitioners' whole point is that they should not be forced to accept an adjudication of their speech's lawfulness with the threat of sanctions hanging over them.

C. If anything, prudential factors underscore the critical need for prompt judicial review of the false-statement regime. The Commission does not deny that Ohio's law is actually inhibiting political speech during elections, when the First Amendment "has its fullest and most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Yet the cases it cites for the proposition that judicial review is not wholly unavailable in the Sixth Circuit only prove petitioners' point: that a speaker may obtain such review only *after* being found guilty. *See Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576-77 (6th Cir. 1991) (review only after OEC "recommended ... prosecution"); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 490 (6th Cir. 1995) (review only after OEC "found Briggs guilty"). (Opp.59.) Such a backward rule guarantees that truthful speech during election campaigns will be substantially burdened.

Moreover, even speakers hardy enough to expose themselves to prosecution are routinely stymied by either (i) the Commission's dismissal of the charges *after* imposing "costs in time and money"; or (ii) the withdrawal of the charges "after the election" as part of a "cynical" strategy to manipulate the system. Amicus Br. of Ohio Atty. Gen. at 6, 13. The resulting Catch-22 has perpetuated a grossly unconstitutional regime for decades. Enough is enough.

CONCLUSION

This Court should reverse the decision below.

CHRISTOPHER P. FINNEY
THE FINNEY LAW FIRM
4270 Ivy Pointe Blvd.
Cincinnati, OH 45245

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Ct.
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan St.
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

DAVID R. LANGDON
JOSHUA B. BOLINGER
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

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AMICUS CURIAE BRIEF

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v.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PARTIAL REVERSAL

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MICHAEL S. RAAB
JAYNIE LILLEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Library of Congress
Law Library

QUESTION PRESENTED

When one of the petitioners in this case criticized a Congressman for his support of a particular federal statute, a panel of the Ohio Elections Commission found probable cause that the criticism had violated state laws regulating election-related speech. Petitioners filed suit against Commission officials, the Commission itself, the Ohio Secretary of State, and the now-former Congressman alleging petitioners' intent to make similar speech in the future and seeking to preclude enforcement of certain state electoral-speech laws.

The question presented is whether any or all of petitioners' claims—which raise First Amendment, due process, and preemption-based challenges to the state electoral-speech laws—are justiciable with respect to any or all of those defendants.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PARTIAL REVERSAL

INTEREST OF THE UNITED STATES

This case concerns the circumstances in which a suit seeking to preclude enforcement of a law is justiciable. The federal government frequently litigates challenges to federal statutes and regulations, and such cases often present threshold questions of scope, timing, and the identity of any proper parties. See, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967). The United States accordingly has a substantial interest in the resolution of the question presented.

STATEMENT

1. Petitioner Susan B. Anthony List (SBA List) is a nonprofit organization that advances pro-life causes.

Pet. App. 3a. During the 2010 election cycle, SBA List disseminated materials criticizing then-incumbent Ohio Representative Steve Driehaus's vote in favor of the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 119 (2010). Pet. App. 3a, 43a. The materials described Driehaus as having supported "taxpayer-funded abortion." *Ibid.*

Driehaus filed a complaint against SBA List with the Ohio Elections Commission, an independent state agency that accepts complaints from "any person" who alleges a violation of certain state election laws. Pet. App. 2a-3a; Ohio Rev. Code Ann. § 3517.153(A) (LexisNexis 2013) (Ohio Rev. Code). One of those laws provides, *inter alia*, that "[n]o person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, * * * shall knowingly and with intent to affect the outcome of such campaign" engage in certain activities. Ohio Rev. Code § 3517.21(B); see *id.* § 3517.153(A). Two such activities are "[m]ak[ing] a false statement concerning the voting record of a candidate or public official," *id.* § 3517.21(B)(9), and "disseminat[ing] a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate," *id.* § 3517.21(B)(10). Those activities are punishable by up to six months of imprisonment, a fine up to $5000, or both. *Id.* § 3517.992(V); see *id.* § 3599.39 (requiring disenfranchisement following successive convictions). Driehaus's complaint here alleged a violation both of those false-electoral-speech laws and

of a separate disclaimer law, which requires disclosure of the entities that funded certain electoral communications. Pet. App. 43a-44a; see Ohio Rev. Code § 3517.20(A)(2); see also *id.* § 3517.992(U) (violation of disclaimer law punishable by fine of up to $500); *id.* § 3599.39.

A complaint to the Commission is initially reviewed by a staff attorney. Ohio Rev. Code § 3517.154(A)(1). In nonexpedited cases, the Commission then has 90 business days in which to hold a hearing, at which it must "determine whether or not the * * * violation alleged in the complaint has occurred." *Id.* § 3517.155(A)(1); see *id.* § 3517.155(B) (permitting further investigation when evidence is insufficient). If the Commission finds, by clear-and-convincing evidence, that one of the false-electoral-speech provisions at issue here has been violated, it must "refer the matter to the appropriate prosecutor." *Id.* § 3517.155(D)(2); see *id.* § 3517.155(D)(1) (burden of proof). A prosecutor may not bring criminal charges under the false-electoral-speech provisions unless and until the Commission has received a complaint and completed its proceedings with respect to the complaint. *Id.* § 3517.153(C). Commission decisions must be made public, and they are subject to judicial review. *Id.* §§ 3517.153(E), 3517.157(D).

Ohio law provides special expedited procedures for certain complaints, like Driehaus's, that are filed close to the time of the election. See Ohio Rev. Code §§ 3517.154(A)(2)(a), 3517.156. A panel of at least three Commission members must hold a hearing, generally within two business days, to determine whether probable cause of a violation exists. *Id.* § 3517.156(A)-(C). If it finds no probable cause,

the complaint is immediately dismissed. *Id.* § 3517.156(C)(1). If it finds probable cause, the full Commission must, within ten days, hold a hearing on the complaint. *Id.* § 3517.156(C)(2); see *id.* § 3517.156(C)(3) (permitting further investigation where evidence is insufficient).

Here, a Commission panel, by a 2-to-1 vote, found probable cause that SBA List had violated the false-electoral-speech provisions. Pet. App. 4a. But it dismissed Driehaus's claim that SBA List had violated the state disclaimer law, reasoning that the disclaimer law was preempted by federal law. *Id.* at 44a. A hearing before the full Commission on the alleged violations of the false-electoral-speech provisions was set for two weeks later, and the parties began discovery. *Id.* at 4a; see Ohio Admin. Code 3517-1-09 (2008) (discovery rules). Driehaus and SBA List subsequently agreed to postpone the full Commission hearing until after the election. Pet. App. 5a. Driehaus eventually lost the election, and he later moved to withdraw the complaint he had filed with the Commission. *Ibid.* SBA List consented to the motion, which the Commission granted. *Ibid.*

2. a. During the two-week interval between the probable-cause determination and the scheduled hearing before the full Commission, SBA List filed suit in federal district court, seeking declaratory and injunctive relief against enforcement of the Ohio statutory scheme. Pet. App. 4a. The district court denied SBA List's motion for a temporary restraining order and stayed the federal action in light of the pending state proceedings. *Id.* at 5a; see *Younger* v. *Harris*, 401 U.S. 37 (1971). The court of appeals upheld that stay. Pet. App. 5a.

b. After the Commission proceedings were dismissed, SBA List amended its complaint. Pet. App. 5a. The amended complaint alleged that SBA List's speech about Driehaus had been chilled; that SBA List "intend[ed] to engage in substantially similar activity in the future"; and that it "face[d] the prospect of its speech and associational rights again being chilled and burdened" by the prospect of future Commission proceedings. J.A. 121-122. The complaint sought prospective relief that would preclude such proceedings. J.A. 127-128. The complaint named Driehaus, the Commission's members and its staff attorney (in their official capacities), and the Ohio Secretary of State (in her official capacity) as defendants. J.A. 112-113. And it raised a variety of legal claims: that the state false-electoral-speech provisions violate the First Amendment on their face (Counts 1 and 3); that those provisions violate the First Amendment as applied to lobbyists taking positions on political issues (Counts 2 and 4); that the Commission's procedures for investigating violations of the false-electoral-speech provisions are unconstitutional (Count 5); and that the state disclaimer law is preempted by a section of the Federal Election Campaigns Act (FECA), 2 U.S.C. 453(a) (Count 6). J.A. 122-127.

The district court consolidated SBA List's suit with a separate suit by petitioner Coalition Opposed to Additional Spending & Taxes (COAST), an anti-tax advocacy organization that also sought to prevent future enforcement of the same state laws. Pet. App. 2a, 5a-6a; see J.A. 138-161. COAST's complaint (as amended) alleged that it had intended to disseminate materials criticizing Driehaus's vote for the Affordable Care Act as a vote "in favor of taxpayer-funded abor-

tion"; that the initiation of the Commission proceedings against SBA List had deterred it from engaging in that speech; that it desired in future election cycles "to make the same or similar statements" about Driehaus and other candidates who voted for or supported the Affordable Care Act; and that the prospect of future proceedings before the Commission chilled it from doing so. J.A. 146-150; Pet. App. 5a-6a. The complaint named the Commission, the Commission's members and its staff attorney (in their official capacities), and the Ohio Secretary of State (in her official capacity) as defendants. J.A. 142-143. The complaint raised a number of legal claims that substantially overlapped with SBA List's: that the false-electoral-speech provisions violate the First Amendment on their face (Counts 1 and 3); that the provisions violate the First Amendment as applied to citizens and organizations taking positions on political issues (Counts 2 and 4); that the false-electoral-speech and disclaimer laws are preempted by FECA (Counts 5-7); and that Commission's procedures violate the Due Process Clause (Count 8). J.A. 153-159.

c. The district court dismissed both suits as nonjusticiable. Pet. App. 21a-41a, 42a-63a. The district court concluded that neither suit presented a sufficiently concrete controversy for purposes of standing and ripeness, primarily because the Commission had not definitively determined that SBA List had violated Ohio election law and because it was not clear that future proceedings against either SBA List or COAST were likely. *Id.* at 23a-34a, 36a, 38a, 54a-63a. The district court also concluded that SBA List's claims had been mooted by the termination of the Commission proceedings and that the Secretary of State

was entitled to Eleventh Amendment immunity. *Id.* at 34a-41a.

3. The court of appeals affirmed, solely on ripeness grounds. Pet. App. 1a-18a. It explained that the ripeness doctrine is designed to "prevent[] federal courts from entangling themselves in a premature adjudication of legal matters." *Id.* at 7a (internal quotation marks, citation, and brackets omitted). The court further explained that "[t]hree factors guide the ripeness inquiry: (1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Id.* at 7a (citation omitted).

The court of appeals stated that, "[i]n the First Amendment context, the likelihood-of-harm analysis focuses on [1] how imminent the threat of prosecution is and [2] whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute." Pet. App. 8a (internal quotation marks and citation omitted). On the first issue, the court of appeals reasoned that the Commission panel's probable-cause determination against SBA List did not show "an imminent threat of prosecution," because the Commission had never made a final determination "that SBA List violated Ohio's false-statement law." *Id.* at 10a. The court additionally observed that Driehaus had moved abroad and that it was accordingly "speculative" that any complaint would ever be filed against SBA List in the future. *Id.* at 12a-14a. On the second issue, the court of appeals reasoned that because SBA List "insist[ed] that the statement it made and plans to repeat

* * * is factually true," the "possibility of prosecution for uttering such statements [is] exceedingly slim." *Id.* at 15a.

The court of appeals also concluded that the "factual record here is not sufficiently developed to review SBA List's claims," because adjudication of those claims "would require [a court] to guess about the content and veracity of SBA List's as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law." Pet. App. 16a. Finally, the court concluded that "[w]ithholding judicial relief will not result in undue hardship to SBA List," because "[n]o complaint or Commission action is pending against SBA List"; "SBA List has not demonstrated an objective fear of future enforcement"; and SBA List "continued to actively communicate its message about Driehaus' voting record" even after the Commission panel's probable-cause determination. *Id.* at 17a.

The court of appeals also affirmed the dismissal of COAST's complaint. Pet. App. 18a. It reasoned that the claims raised by COAST, which had "never been involved in a Commission proceeding" and had not been threatened with legal action, were "even more speculative than SBA List's." *Ibid.*

SUMMARY OF ARGUMENT

Petitioners' suit against the Commission officials is justiciable to the extent petitioners are raising a facial First Amendment challenge to Ohio's false-electoral-speech restrictions. Petitioners do not specifically challenge the court of appeals' decision insofar as it affirmed the dismissal of petitioners' remaining

claims, but those claims are largely nonjusticiable in any event. This Court should accordingly reverse in part and permit petitioners' suits to continue in an appropriately bounded fashion.

I. In order to establish Article III standing, a plaintiff must show an imminent, nonconjectural injury that is traceable to the defendants and redressable by relief against those defendants. See, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). That burden is extremely difficult to carry when the plaintiff is challenging a statute that does not directly regulate primary conduct, and instead simply authorizes government officials to take certain actions in the future. But where, as here, the plaintiff is challenging a criminal statute that regulates primary conduct, this Court has generally found sufficient injury when the plaintiff faces a "credible threat of prosecution." See, *e.g.*, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010).

Petitioners have adequately established a credible threat of prosecution under Ohio's false-electoral-speech laws. They have sufficiently alleged that, but for those laws, they would likely make election-related speech about the Affordable Care Act. Although petitioners have not affirmatively conceded that their speech would violate the false-electoral-speech laws, the Commission panel's probable-cause determination about SBA List's previous statements provides an adequate basis for finding a credible threat of prosecution. In the context of this case, the relevant "prosecution" can be regarded as including a hearing before the full Commission, because a determination by the Commission that petitioners knowingly misinformed the electorate during an ongoing election would not

only increase the prospect of a criminal prosecution but also could substantially impede petitioners' ability to engage in electoral advocacy. The fact that a Commission panel previously found probable cause to trigger full Commission proceedings against SBA List could embolden future complaints and shows a sufficient prospect of future proceedings against petitioners to satisfy Article III.

Petitioners have not, however, established an Article III injury with respect to their claims challenging Ohio's disclaimer law and particular Commission procedures. Even assuming petitioners have preserved a challenge to the dismissal of those claims, they cannot show a likelihood that the disclaimer law (which the Commission found to be preempted) or the particular procedures will be applied to them. In addition, petitioners' credible-threat-of-prosecution injury is only traceable to, and redressable by relief against, the Commission officials. It is wholly speculative that Driehaus (who may never run for Congress again) or the Ohio Secretary of State (who took no action in response to SBA List's prior speech) would ever initiate enforcement proceedings against petitioners.

II. The sufficiency of petitioners' allegations of imminent injury is a necessary, but not a sufficient, condition for satisfying the ripeness doctrine, which precludes federal courts from prematurely adjudicating disputes that are not yet sufficiently concrete. One additional ripeness criterion is that the issues presented be fit for judicial decision. *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). That requirement generally forecloses preenforcement challenges to hypothetical future applications of a law, as well as facial claims that would bene-

fit from further development of the facts or interpretation of the law. Here, petitioners' challenges to the Commission's procedures (which require hypothesizing how those procedures might affect particular cases) and their as-applied First Amendment claims (which appear to require context-dependent determinations) are not fit for judicial review. Petitioners' facial First Amendment challenges to Ohio's false-electoral-speech laws, however, are entirely legal in nature and appear to be fit for judicial decision. The same would likely have been true of petitioners' preemption claims, had petitioners not forfeited them.

The other additional ripeness criterion requires consideration of the hardship to the parties from withholding review, balancing the potential burden on the plaintiff against the possibility of inappropriately interfering with administrative action. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998). In the particular circumstances of this case, that analysis favors allowing petitioners to proceed on their facial First Amendment challenges to the false-electoral-speech laws. In light of the paramount importance of election-related speech, the burden on petitioners of withholding review is uniquely high. And because adjudication of these suits would neither force an agency to take a premature position on how the law would apply to certain facts, nor circumvent a legislative scheme that contemplates case-by-case public health, safety, or comparable determinations by an administrative agency, they will not inappropriately interfere with administrative activity.

ARGUMENT

Article III limits the jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const.

Art. III, § 2. The doctrines of standing and ripeness "originate" from that textual limitation and help to ensure that federal litigation remains within constitutionally prescribed boundaries. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006); see *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). The standing and ripeness doctrines often overlap, see, *e.g.*, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007), and this Court frequently evaluates the justiciability of pre-enforcement suits through the lens of Article III's basic case-or-controversy requirement, rather than as a specific question of standing or ripeness, see, *e.g.*, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010); *Golden* v. *Zwickler*, 394 U.S. 103, 104-110 (1969). Here, petitioners' suits are justiciable to the extent they seek relief against the Commission officials on the basis of facial First Amendment challenges to Ohio's substantive restrictions on false electoral speech. Petitioners' remaining claims, however, have been forfeited by petitioners' decision not to pursue them in this Court and are, in any event, largely nonjusticiable.

I. PETITIONERS HAVE STANDING TO THE EXTENT THEIR SUITS SEEK TO PRECLUDE THE COMMISSION OFFICIALS' ENFORCEMENT OF OHIO'S RESTRICTIONS ON FALSE ELECTORAL SPEECH

To establish Article III standing, a plaintiff must show (1) that he has "suffered an injury in fact * * * which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a sufficient "causal connection between the injury and the conduct complained of"; and (3) a "likel[ihood] * * * that the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*,

504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted); see, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). The plaintiff must "demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp.*, 547 U.S. at 352 (citation omitted). Petitioners here have sufficiently alleged standing to seek relief that would preclude the Commission officials from enforcing the challenged false-electoral-speech restrictions, but not to seek relief with respect to other laws or other defendants.

A. The Commission Panel's Probable-Cause Determination Shows A Sufficiently Credible Threat Of A False-Statement Prosecution To Satisfy Article III's Injury Requirement

1. This Court has "repeatedly reiterated" that a "'threatened injury must be *certainly impending* to constitute injury in fact'" and that "'allegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)) (brackets omitted). The determination whether a plaintiff has sufficiently alleged injury is context-specific, see *Allen*, 468 U.S. at 752, and depends heavily on the precise nature of the plaintiff's claim.

A plaintiff typically will not be able to show "certainly impending" injury when challenging a law that does not regulate primary conduct but instead simply authorizes government officials to take certain actions in the future. In *Clapper* v. *Amnesty Int'l*, *supra*, for example, the Court found that the plaintiffs did not have standing to challenge a statute authorizing government surveillance, where their assertions of injury "relie[d] on a highly attenuated chain of possibilities"

about how various entities might act. 133 S. Ct. at 1148; see *id.* at 1148-1150. Nor could the plaintiffs "manufacture standing" by altering their primary conduct "based on their fears of hypothetical future harm that [was] not certainly impending." *Id.* at 1151. Similarly, in *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), the Court found no threat of imminent and concrete injury to plaintiffs who challenged regulations authorizing the U.S. Forest Service to take certain land-management actions without satisfying certain procedural prerequisites, *id.* at 495-496, rejecting contentions that an imminent injury could be shown based on a "statistical probability," or even a "*realistic* threat," of harm. *Id.* at 497-500. And in *Laird* v. *Tatum*, 408 U.S. 1 (1972), the Court found a challenge to an Army data-gathering program nonjusticiable notwithstanding the contention that the program "produce[d] a constitutionally impermissible chilling effect upon the exercise of [the plaintiffs'] First Amendment rights," emphasizing that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14.

This Court has, however, permitted plaintiffs challenging a criminal statute that regulates primary conduct to satisfy the imminent-injury requirement by showing that a "credible threat of prosecution" has effectively coerced them to comply with the challenged law. *Humanitarian Law Project*, 130 S. Ct. at 2717; *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (*Farm Workers*); see *MedImmune*, 549 U.S. at 129 (citing cases in which a "genuine threat of enforcement" was sufficient for justiciability). The presence of such a threat does not flow

automatically from the mere existence of a substantive law backed by an enforcement scheme. Rather, when plaintiffs "'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Farm Workers*, 442 U.S. at 298-299 (quoting *Younger* v. *Harris*, 401 U.S. 37, 42 (1971)). And the plaintiff must establish a "prospect of immediacy and reality" that an "occasion might arise when [the plaintiff] might be prosecuted." *Zwickler*, 394 U.S. at 109 (internal quotation marks and citation omitted). Even if a plaintiff has been prosecuted for particular conduct in the past, the plaintiff does not show a credible threat of prosecution unless the plaintiff is likely to engage in such conduct in the near future. See *id.* at 104-105 & n.2, 109-110 (plaintiff previously prosecuted under anonymous-handbilling law could not bring pre-enforcement suit where his "sole concern was literature relating to [a] Congressman" unlikely to run again).

In the context of a challenge to a criminal law that directly regulates expression, a plaintiff generally can establish a credible threat of prosecution by alleging an intent to engage in certain speech and conceding that the speech would violate the challenged law. In *Babbitt* v. *United Farm Workers National Union*, *supra*, for example, the Court found a credible threat of prosecution under a statute prohibiting false speech on labor-relations matters, because the plaintiffs alleged a desire to continue speaking on those matters and because inadvertently false speech "is inevitable in free debate." 442 U.S. at 301 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964)). The

Court in that case also found a credible threat of prosecution when the plaintiffs alleged an intent to continue past conduct that a different aspect of the statute "now arguably prohibited," where it was the plaintiffs themselves who affirmatively argued that the statute covered that conduct. *Id.* at 302-303; see, *e.g.*, *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (finding injury where plaintiffs interpreted statute to apply to their conduct).

A plaintiff who sufficiently alleges an intent to engage in expressive activity in the future, but does not concede that the speech would violate the challenged law, faces a more difficult hurdle. The plaintiff must allege sufficient "evidence" that, even though his speech may not violate the statute, there is a realistic prospect that government authorities would prosecute him. *Harris*, 401 U.S. at 42 (suggesting that a plaintiff described as "uncertain" about whether he would be prosecuted for certain conduct might be able to present "evidence" that he would be). A plaintiff likely could not clear that hurdle simply by alleging that government officials were investigating similar conduct in which the plaintiff had previously engaged, or that government officials had warned the plaintiff of their informal advisory view that the plaintiff had violated the law (particularly if the officials expressed willingness to discuss the matter further). In neither instance would the officials' tentative views or actions in themselves necessarily amount to a "specific threat * * * to arrest or prosecute." *Boyle* v. *Landry*, 401 U.S. 77, 81 (1971). But the hurdle is not insurmountable. In *Steffel* v. *Thompson*, 415 U.S. 452 (1974), for example, the Court found a credible threat of prosecution under a trespass statute based on the

fact that the plaintiff had "been twice warned to stop handbilling that he claim[ed was] constitutionally protected," had "been told by the police that if he again handbill[ed] at the shopping center and disobey[ed] a warning to stop he w[ould] likely be prosecuted," and had witnessed "the prosecution of his handbilling companion." *Id.* at 459.

2. To the extent that petitioners in this case are challenging Ohio's substantive criminal prohibitions on false electoral speech, they can establish an imminent injury by showing a "credible threat of prosecution" under those statutes. Petitioners have carried that burden here by alleging that they intend to "repeat" speech—namely, petitioners' characterization of the Affordable Care Act as "allow[ing] for taxpayer-funded abortions"—that a Commission panel found probable cause to be in violation of Ohio's false-electoral-speech laws. Pet. App. 15a; see *id.* at 3a-4a; see also J.A. 122, 149-150. That speech—which petitioners might direct at candidates who either voted for or supported the Affordable Care Act, see, *e.g.*, J.A. 149—is generalizable enough to create an "immedia[te] and real[]" prospect that "another occasion might arise" in which petitioners would repeat it. *Zwickler*, 394 U.S. at 109. And the Commission panel's probable-cause determination shows a sufficient likelihood of the requisite harm.

In the particular context of this case, the relevant "prosecution" could be regarded as including the proceeding before the full Commission that adjudicates whether a violation of the false-electoral-speech statutes has occurred. See Ohio Rev. Code § 3517.155. Although the focus in evaluating the credible threat of prosecution under a criminal statute should normally

be on the potential for criminal proceedings, this Court has noted that civil-enforcement proceedings can at least sometimes present similar concerns. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 n.1 (1986); *Farm Workers*, 442 U.S. at 302 n.13. Here, Commission proceedings not only are a precursor to possible criminal prosecution, but also themselves directly affect election-related speech. The State describes the Commission's proceedings as having their own "truth-declaring function" in respect to electoral speech, Br. in Opp. 6 (internal quotation marks and citations omitted), which could impose its own unique burdens in the electoral setting, even in the absence of any criminal prosecution. Cf. *Meese* v. *Keene*, 481 U.S. 465, 473-476 (1987). Indeed, someone found in violation by the Commission is considered "adversely affected" for purposes of seeking judicial review, reflecting the State's view that the Commission's action itself may have a concrete impact in the election context. Ohio Rev. Code § 3517.157(D); see Br. in Opp. 6.

There is no need in this case to decide whether the prospect of a Commission determination alone is sufficient to constitute the sort of "credible threat" necessary for standing. Rather, it is enough to say that the prospect of a Commission determination, combined with the increased prospect of a criminal prosecution following such a determination, is sufficient. It is significant that, under Ohio's statutory scheme, an official and public determination by the Commission, made after a hearing, to the effect that petitioners knowingly misinformed the electorate in the context of an ongoing election could reasonably be expected to reduce the effectiveness of petitioners' election-

related message. Cf., *e.g.*, Pet. App. 3a (noting that the threat of legal action led a billboard operator to refuse to display SBA List's message). It is also significant that Commission proceedings are not part of a broad commercial regulatory scheme in which agency determinations about the lawfulness of particular conduct are a necessary part of doing business. We do not suggest that mere pronouncements by government officials outside of the election context would in themselves be actionable.

The bare fact that someone once tried to initiate a full Commission proceeding against a plaintiff would not itself show a credible threat sufficient to establish standing. In the absence of evidence that another complaint might be filed, any threat of future prosecution would be speculative. See, *e.g.*, *Landry*, 401 U.S. at 80-81; *Zwickler*, 394 U.S. at 109. But the Commission panel's previous probable-cause determination renders the threat in this case sufficiently credible to create a justiciable controversy. Although the determination would not bind the Commission in future cases, it could embolden future complaints against similar speech (by SBA List or COAST) and indicates a sufficient likelihood that such speech would result in full Commission proceedings. Ohio Rev. Code § 3517.156(C)(2) (upon finding probable cause, the panel "*shall* refer the complaint to the full commission") (emphasis added).

In rejecting the significance of the Commission panel's probable-cause determination, the court of appeals relied on *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). See Pet. App. 10a-11a. That reliance was misplaced. In *Standard Oil*, this Court held that the Administrative Procedure Act (APA), 5 U.S.C. 551 *et*

seq., did not permit a plaintiff to challenge the Federal Trade Commission's issuance of an administrative complaint alleging "reason to believe" that the plaintiff had violated federal law. 449 U.S. at 234-235, 243. The Court reasoned that the complaint was not the sort of "definitive statement of position" or "definitive ruling or regulation," *id.* at 241, 243, that would constitute "final agency action" within the meaning of the APA's authorization of judicial review, 5 U.S.C. 704. 449 U.S. at 238. This case, however, is not an APA action and thus is not subject to the "final agency action" limitation. In addition, unlike the plaintiff in *Standard Oil*, petitioners here are not directly challenging an agency's preliminary determination as such, but instead are relying on the Commission panel's probable-cause determination to demonstrate a credible threat of prosecution under Ohio's false-electoral-speech restrictions.

3. Petitioners' opening brief does not address the justiciability of their claims challenging the state disclaimer law and the Commission's investigatory procedures. See J.A. 125-127 (SBA List complaint Counts 5-6); J.A. 156-157 (COAST complaint Count 7). Even assuming a challenge to the dismissal of those claims were adequately preserved, however, petitioners did not sufficiently allege an imminent injury with respect to those claims.

The Commission panel unanimously concluded that the disclaimer law is preempted by FECA (and thus unenforceable). Pet. App. 44a. Petitioners accordingly cannot demonstrate a realistic prospect that they will ever be subject to prosecution under that law. See *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961) (plurality opinion) ("If the prosecutor expressly agrees not to

prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here.") (citing *CIO* v. *McAdory*, 325 U.S. 472, 475 (1945)); *Humanitarian Law Project*, 130 S. Ct. at 2717.

SBA List's claim that the Commission's investigatory procedures "require[] disclosure of past expressions and associations to a political opponent" in violation of the First Amendment appears to be challenging the Commission's discovery procedures. J.A. 125-126; see Ohio Admin. Code 3517-1-09. Those procedures do not regulate primary conduct, compare *Earth Island Institute*, 555 U.S. at 493; it is wholly speculative whether, in some future hearing, discovery of "past expressions and associations" would be requested or that the Commission would allow such discovery, see *Clapper*, 133 S. Ct. at 1148-1150; and petitioners could challenge such discovery in the future if the occasion arises. See p. 27, *infra* (explaining that this claim is also unripe).

B. Only Petitioners' Claims Against The Commission Officials Satisfy Article III's Traceability And Redressability Requirements

In order for petitioners to satisfy all of the requirements for Article III standing, they must show that their injury from the threatened enforcement of the false-electoral-speech restrictions is "fairly traceable to the challenged action of the defendant" and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Defenders of Wildlife*, 504 U.S. at 561 (alterations and citations omitted). Under the circumstances of this case, petitioners have satisfied those requirements with respect to their claims against the Com-

mission officials who are sued in their official capacities. Petitioners' alleged injury arises from the threat of proceedings before the Commission, which could in turn lead to criminal prosecution, and it appears that a judicial order precluding the Commission officials from undertaking such proceedings would remedy that injury.[1]

Petitioners cannot show traceability and redressability, however, for their claims against Driehaus and the Ohio Secretary of State. It is undisputed that in June 2011, Driehaus moved to Africa for a 30-month Peace Corps mission. Pet. App. 5a; see 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, at 159-160 (3d ed. 2004) (noting that courts will, if necessary, look outside the pleadings on a motion to dismiss for lack of jurisdiction). The court of appeals correctly concluded that the evidence Driehaus will again run for Congress is "thin at best," and it is thus highly speculative that he would initiate a future Commission proceeding against petitioners. Pet. App. 14a; see *Zwickler*, 394 U.S. at 109 (finding assertion that Congressman might run again insufficient for justiciability).

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[1] Under Ohio Rev. Code § 3517.153(C), a prosecutor may not institute criminal proceedings unless a complaint has first been filed with the Commission and the Commission has completed its proceedings on the complaint. That provision does not expressly state that prosecution is barred if the Commission fails to find, by clear-and-convincing evidence, that a violation occurred. But that appears to be the intended effect of the provision; petitioners read it in that manner (Br. 47); and respondents have not said otherwise in this Court, see Br. in Opp. 6. We therefore proceed on the assumption that an injunction against the Commission officials would afford complete relief by barring *both* Commission proceedings *and* criminal prosecution.

The only potential basis for suing the Ohio Secretary of State is the Secretary's "statutory duty to file a Commission complaint if he 'has or should have knowledge of' an election-law violation." Pet. App. 13a (quoting Ohio Rev. Code § 3501.05(N)(2)). But it is purely speculative that the Secretary would file a complaint in response to statements like those at issue here. As the court of appeals pointed out (*ibid.*), the Secretary did not file a complaint when SBA List engaged in such speech in the past.[2]

II. PETITIONERS' FACIAL FIRST AMENDMENT CHALLENGE TO OHIO'S FALSE-ELECTORAL-SPEECH RESTRICTIONS IS RIPE FOR RESOLUTION

The ripeness doctrine provides an additional limitation on justiciability, "designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies [and] to protect * * * agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 807-808 (2003) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967)). The doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Id.* at 808 (quoting *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

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[2] COAST's claims against the Commission itself are barred by sovereign immunity. See *Cory* v. *White*, 457 U.S. 85, 90-91 (1982).

At its most basic level, the ripeness doctrine precludes federal courts from adjudicating claims involving "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985) (citation omitted). The doctrine's focus on the likelihood of future events means that it overlaps to some degree with the imminent-injury element of Article III standing. Ripeness analysis, however, additionally requires a focus on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Id.* at 581 (quoting *Abbott Labs.*, 387 U.S. at 149); see, *e.g.*, *National Park Hospitality Ass'n*, 538 U.S. at 808. Petitioners' claims in this case satisfy those criteria to the extent petitioners contend that the challenged false-electoral-speech restrictions are wholly invalid under the First Amendment. Petitioners' other claims, however, are not fit for judicial review or have been forfeited.

A. Petitioners' First Amendment Claims Are Ripe To The Extent Petitioners Argue That The False-Electoral-Speech Restrictions Are Entirely Invalid

1. A claim is generally unfit for judicial review when its adjudication would require a court to address the application of law to an abstract factual scenario. In most cases, "[t]he operation of [a] statute is better grasped when viewed in light of a particular application." *Texas* v. *United States*, 523 U.S. 296, 301 (1998). Among other things, a court will often lack sufficient "imagination" to determine the various ways in which a law might operate in practice, *ibid.*; the operation of the law may depend upon the particularized details of agency implementation, see, *e.g.*, *Ohio*

Forestry Ass'n v. *Sierra Club*, 523 U.S. 726, 736 (1998); and for any number of reasons, even a plaintiff's own intended future conduct may not "occur as anticipated, or indeed may not occur at all," *Union Carbide*, 473 U.S. at 580-581. This Court has accordingly explained that where a plaintiff seeks "to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable," the suit "involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224 (1954).

In *Renne* v. *Geary*, 501 U.S. 312 (1991), for example, the Court found a First Amendment challenge to a state law unripe in large part because the case presented "no factual record of an actual or imminent application" of the law "sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Id.* at 321-322 (quoting *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584 (1947)). Although plaintiff political-party officials alleged that they wished to endorse candidates in nonpartisan elections, in the face of state law limiting endorsements in such elections, the Court observed that "[w]e do not know the nature of the endorsement," "how [the endorsement] would be publicized," or what "precise language" in the endorsement might lead to an objection from state officials. *Id.* at 322. The Court also noted a question about whether the challenged law even "applie[d] to" individuals like the plaintiffs and raised the possibility that further consideration by the state courts could "provide further definition" to the provision's "operative language." *Id.* at 323.

Even the adjudication of a claim styled as a facial challenge will frequently entail consideration of implementation details more readily evaluated in the context of an actual, as opposed to hypothetical, application of the law. In *National Park Hospitality Ass'n* v. *Department of the Interior*, *supra*, for example, the Court concluded that a "facial challenge" to a regulation about concession contracts should "await a concrete dispute about a particular concession contract," because the parties were "rely[ing] on specific characteristics of certain types of concession contracts to support their positions." 538 U.S. at 812. Similarly, in *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967), the Court reasoned that adjudicating a challenge to an agency's authority to promulgate regulations permitting inspection of certain business facilities would "depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the [agency], the need for various sorts of supervision in order to effectuate the goals of [the governing statute], and the safeguards devised to protect legitimate trade secrets." *Id.* at 163-164. The Court concluded that "judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here." *Id.* at 164.

In some cases, doctrinal considerations will also counsel against pre-enforcement judicial review of a law's facial validity. In *Geary*, for example, the Court emphasized that "[i]t is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue * * * before it is

determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." 501 U.S. at 324 (quoting *Board of Trs., State Univ.* v. *Fox*, 492 U.S. 469, 484-485 (1989)).

2. Applying those principles here, several of petitioners' claims are unripe. First, petitioners' claims challenging the Commission's procedures—SBA List's claim that the Commission's discovery procedures are unconstitutional, J.A. 125-126 (SBA List complaint Count 5), and COAST's claim that Commission officials' nonlegal backgrounds and probable-cause-hearing procedures violate due process, J.A. 158-159 (COAST complaint Count 8)—would be unfit for judicial review, even if a challenge to their dismissal had been preserved. See p. 21, *supra* (explaining that SBA List in any event lacks standing to raise its procedural claim). Assessing these claims in the abstract would require speculation about whether or how certain procedures might, if employed in certain ways in some hypothetical proceeding, violate a party's rights. Review should thus await a case in which "the consequences ha[ve] been 'reduced to more manageable proportions,' and where the 'factual components [are] fleshed out, by some concrete action.'" *Ohio Forestry Ass'n*, 523 U.S. at 736-737 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

Second, petitioners' as-applied First Amendment challenges to the false-electoral-speech laws are also unfit for judicial review. See J.A. 123-125 (SBA List complaint Counts 2 and 4); J.A. 154-155 (COAST com-

plaint Counts 2 and 4). The descriptions of the groups as to which application of the laws is alleged to be unlawful—"lobbyists taking positions on political issues" and "citizens and organizations taking positions on political issues," J.A. 123-125, 154—are broad and unclear. It therefore may be difficult, in a pre-enforcement context, for a court to adequately appreciate the contours of petitioners' claims. In addition, petitioners' reference to such groups suggests a belief that the false-electoral-speech restrictions affect those groups differently from how they affect the public at large. That type of argument would benefit from a concrete factual context. See *National Park Hospitality Ass'n*, 538 U.S. at 812.

3. The court of appeals erred, however, in concluding that petitioners' facial First Amendment claims are categorically unfit for judicial review. See Pet. App. 16a-17a; see J.A. 122-124 (SBA List complaint Counts 1 and 3); J.A. 153-154 (COAST complaint Counts 1 and 3). The court reasoned that adjudication of those claims "would require [a court] to guess about the content and veracity of SBA List's as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law." Pet. App. 16a. To the extent the court of appeals focused on the likelihood of future Commission proceedings, it repeated the errors it made in declining to find a credible threat of prosecution.

The court's concern about the lack of certainty as to the precise content of petitioners' future speech does have some validity. It is not clear, for example, when and how SBA List might engage in the speech it

asserts would be "substantially similar" to the statement criticizing Driehaus, J.A. 122, or when and how COAST might engage in speech criticizing other candidates for their support of the Affordable Care Act, J.A. 149. But to the extent that petitioners' facial First Amendment claims do not depend on any disputed construction of the statutes at issue or any particular application of them, it appears that further factual development "would not * * * significantly advance [a court's] ability to deal with the legal issues presented nor aid [it] in their resolution." *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81-82 (1978).

It may be the case that not every objection petitioners might advance in support of their facial First Amendment claims would be fit for judicial review. Petitioners variously contend, for example, that the challenged statutes are vague, overbroad, or lack a required element of actual malice. J.A. 122-124, 153-154. Some or all of those contentions may benefit from awaiting a concrete controversy (which might, for example, bring necessary context to a vagueness argument); allowing the Commission or state courts additional opportunity to construe the state laws (which might shed light on the statutory elements), see *Farm Workers*, 442 U.S. at 307-312 (finding abstention appropriate to allow state courts to construe ambiguous state law);[3] or following the "usual judicial

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[3] Just as a federal court can abstain from adjudicating a constitutional challenge to a state statute that would benefit from an authoritative interpretation by a state agency or court, a federal court in certain circumstances can similarly decline as a matter of equitable discretion to consider declaratory or injunctive relief with respect to the constitutionality of a federal statute that is

practice" of avoiding the adjudication of an overbreadth challenge "before it is determined that the statute would be valid as applied," *Geary*, 501 U.S. at 324. But at least to the extent that petitioners argue (see, *e.g.*, Br. 10) that the challenged laws fail strict scrutiny simply because the laws criminalize false statements in an electoral campaign, Pet. 33, and permit a state agency "to serve as arbiter of political truth," Pet. 6, a court could review petitioners' argument even in the absence of an actual application of the challenged laws. See 5 *Federal Practice & Procedure* § 1219, at 281-284 (observing that courts generally permit a plaintiff to augment or supplement the legal theories listed in a complaint).

4. Had COAST preserved any challenges to the dismissal of its claims that the false-electoral-speech provisions are preempted by FECA, see J.A. 155-156 (COAST complaint Counts 5-6), those claims (in contrast to the preemption claim about the separate disclaimer law) likely would have been justiciable. Unlike, for example, the question whether an agency has authority to promulgate a regulation (which often will depend on a number of subsidiary factual considerations, see, *e.g.*, *Toilet Goods Ass'n*, 387 U.S. at 164) the question whether 2 U.S.C. 453(a) (which generally preempts "any provision of State law with respect to election to Federal office") wholly preempts Ohio's false-electoral-speech laws in the context of federal campaigns would not likely benefit from further rec-

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ambiguous with respect to its application in particular circumstances. That approach could, for example, allow an agency with responsibility for taking administrative or other enforcement action to construe and apply the statute in the first instance or to bring an actual enforcement proceeding.

ord development. It would be inappropriate, however, to reverse the dismissal of COAST's preemption claims when petitioners have not raised any specific argument contesting their dismissal. Cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 224 (1997) (declining to address issue that received "scant argumentation").

B. The Hardship To Petitioners From Chilling Election-Related Speech Favors Review

In analyzing the "hardship to the parties of withholding court consideration" for purposes of determining ripeness, this Court has also looked to "whether delayed review would cause hardship to the plaintiffs" and "whether judicial intervention would inappropriately interfere with further administrative action." *Ohio Forestry Ass'n*, 523 U.S. at 733 (citation omitted). In the particular context of petitioners' challenge to Ohio's restrictions on electoral speech, the hardship analysis favors a finding of ripeness.

1. A plaintiff generally has suffered "'hardship' as this Court has come to use that term" only when the plaintiff's primary conduct is directly affected. *Ohio Forestry Ass'n*, 523 U.S. at 733-734; see *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999) (explaining that in the absence of an "immediate effect on [a] plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements"); see, *e.g.*, *Toilet Goods Ass'n*, 387 U.S. at 164 (finding insufficient hardship where the case did not present "a situation in which primary conduct [was] affected"). As a general rule, however, a plaintiff cannot satisfy the hardship requirement merely by alleging that, in the management of its affairs, it faces "uncertainty" as to the meaning

or validity of a legal rule, for otherwise "courts would soon be overwhelmed with requests for what essentially would be advisory opinions." *National Park Hospitality Ass'n*, 538 U.S. at 810-811; see *International Longshoremen's Union*, 347 U.S. at 224. And a plaintiff cannot show "hardship" simply by alleging that it would profit from branching out into some new type of conduct in which it has never tried to engage before (say, the marketing of a new product) that might violate some preexisting legal rule with which the plaintiff has previously been able to comply. Cf., *e.g.*, *Ohio Forestry Ass'n*, 523 U.S. at 734 (focusing in hardship analysis on whether agency action would "force" a plaintiff "to *modify* its behavior") (emphasis added); *National Wildlife Fed'n*, 497 U.S. at 891 (explaining that ripeness under the APA generally requires "concrete action" except when "a substantive rule * * * requires the plaintiff to *adjust* his conduct immediately") (emphasis added). In that situation, too, courts and agencies could be inundated with suits seeking advisory opinions.

This case does not require the Court to determine precisely when an alleged chilling of speech constitutes hardship, because it presents that issue in a unique election-related context that makes the hardship to petitioners particularly clear. Petitioners have sufficiently alleged that a credible threat of prosecution will chill them from engaging in speech relating to elections for public office, the very type of speech to which the First Amendment "has its fullest and most urgent application." *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)). As petitioners explain (Br. 40), under Ohio law, candi-

dates who are the subject of such speech can try to silence it by complaining to the Commission and thereby tying up the speaker in administrative litigation during the short window of time in which the electoral speech would be most effective.[4]

The court of appeals largely disregarded these considerations in favor of focusing on evidence suggesting that the Commission proceedings did not actually deter SBA List from disseminating its message. Pet. App. 17a-18a. The court correctly recognized that evidence of how agency action has affected a plaintiff's conduct is an important factor in the hardship analysis. In this case, however, SBA List's particular reaction to the Commission proceedings during the 2010 election cycle does not eliminate the objectively credible threat of prosecution that petitioners face if they engage in similar speech in future election cycles.

2. A pre-enforcement suit is not ripe where it would "inappropriately interfere with further administrative action." *Ohio Forestry Ass'n*, 523 U.S. at 733. As this Court has recognized, judicial review should not "hinder [an agency's] efforts to refine its policies" or "interfere with the system that [the legislature] specified for the agency to reach * * * decisions." *Id.* at 735-736. Where, for example, case-by-case

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[4] Ohio law does allow a potential speaker to seek an advisory opinion from the Commission that can immunize the speaker from future prosecution. See Ohio Rev. Code § 3517.153(D). In the short timeframe of an election cycle, however, it may not be feasible to obtain such an opinion. Petitioners here presumably have had ample time to seek an advisory opinion during the pendency of this litigation. But such an advisory opinion would effectively be a Commission determination about the truthfulness of SBA List's prior speech, and it would thus in itself present hardship concerns. See pp. 18-19, *supra*.

adjudication by an agency protects the public from tangible harms, such as the sale of unsafe products on the market, a pre-enforcement challenge may be inappropriate. The Court has also long rejected the notion that plaintiffs can get out ahead of an agency by asking a court "to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise." *International Longshoremen's Union*, 347 U.S. at 223-224.

Here, however, so long as petitioners' suits are restricted to their facial First Amendment challenges to Ohio's false-electoral-speech laws, those particular considerations do not counsel in favor of delaying judicial review. Limited to those claims, the suits would not interfere with the Commission's ability to make case-by-case determinations about the legality of particular practices under state law. Rather, the suits would simply challenge Ohio's authority to prescribe criminal sanctions for certain types of false electoral speech at all. Such a challenge would not unduly interfere with agency decisionmaking and, in particular, does not present any concerns sufficient to overcome petitioners' strong interest in immediate resolution of their electoral-speech-related claims.[5]

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[5] The district court erred in concluding (Pet. App. 34a-37a) that SBA List's claims are moot. Although the events of the 2010 election that originally led to the suit have now passed, SBA List's claims for injunctive relief are live with respect to future election cycles. See, *e.g.*, *Davis* v. *FEC*, 554 U.S. 724, 735-736 (2008).

CONCLUSION

The Court should reverse the court of appeals' judgment with respect to petitioners' claims against the Commission officials seeking to preclude enforcement of Ohio's false-electoral-speech provisions on facial First Amendment grounds. The Court should otherwise affirm that judgment.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MICHAEL S. RAAB
JAYNIE LILLEY
Attorneys

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AMICUS CURIAE BRIEF

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BRIEFS

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, AND JON HUSTED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONERS

HEATHER GEBELIN HACKER
DAVID J. HACKER
ALLIANCE DEFENDING FREEDOM
101 Parkshore Dr, Ste. 100
Folsom, California 95630
(916) 932-2850

DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
dcortman@alliancedefendingfreedom.org

Counsel for Amicus Curiae

Library of Congress
Law Library

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INTEREST OF AMICUS[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Additionally, Alliance Defending Freedom is counsel in two cases pending before the Court this term: *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. May 20, 2013); and *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (U.S. Nov. 26, 2013).

Many of our cases involve the proper application of the Free Speech Clause in educational contexts. Scores of public colleges and universities use

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

unconstitutionally overbroad and vague policies to regulate speech on campus, and students subject to those policies suffer a chilling effect on their expressive activities in violation of the First Amendment, even if the policy has never been applied to them. Recognizing that the Court's decision in this case could have an impact on the ability of those individuals to protect their First Amendment rights through pre-enforcement facial challenges to speech codes, Alliance Defending Freedom submits this *amicus curiae* brief to raise awareness of these issues.

SUMMARY OF THE ARGUMENT

Public colleges and universities in this country are uniquely situated as centers for learning and knowledge. The free exchange of ideas on these campuses is critical to preserving their innovative influence on our culture. This atmosphere is stifled, however, when colleges enact policies restricting speech on campus. Such policies are unfortunately common, despite the fact that they are clearly unconstitutional. The only way students can protect their First Amendment rights without risking punishment is by challenging the policies on their face in court. But some courts are beginning to misinterpret standing doctrine under Article III. They defy the common sense principle that students are able to bring constitutional challenges to policies that chill their speech, even if the policies have not been applied to them. The present case contains reasoning which, if not carefully cabined by the Court, could further erode students' abilities to protect their free speech rights on campus. The

Court should therefore specifically clarify standing doctrine for pre-enforcement facial challenges, making clear that students are not required to risk punishment in order to challenge policies that chill their speech on campus. Were it otherwise, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

ARGUMENT

I. BACKGROUND FOR WHY PUBLIC UNIVERSITY SPEECH CODES THREATEN THE AMERICAN UNIVERSITY'S UNIQUE STATUS AS THE "MARKETPLACE OF IDEAS."

It is well settled that at public colleges and universities, the free exchange of ideas is of critical importance to both the atmosphere of inquiry and the pursuit of knowledge on campus. Vigorous protection of civil liberties, particularly First Amendment rights, is therefore of the utmost importance in these enclaves of learning, especially because of their unique influence on our society as a whole. "'The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'" *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). For that reason, the First

Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.*

Written over forty years ago, these words remain a clarion call for a particular vision of the American public university—as a "marketplace of ideas," *Healy v. James*, 408 U.S. 169, 180 (1972), a place where students learn not what to think, but how to think, a place where our civilization transmits the essential values of liberty and free inquiry. Unfortunately, this vision of liberty has been under sustained assault.

For more than twenty years, universities have too often attempted to marginalize and exclude students that are outside the political mainstream of campus. Alan Charles Kors & Harvey Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Harper, 1999). Perhaps the most pernicious and persistent of the various methods of campus censorship is the speech code. Designed to broadly prohibit so-called "offensive" or "harassing" communications, these codes have chilled free speech at campuses from coast to coast. *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 390-405 (2009); Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 33-35 (2008). Facially vague and overbroad, speech codes deter untold thousands of students from speaking freely on critical issues of race, gender, sexuality, and religion. Arbitrarily enforced, they tend to

become weapons of the dominant political culture, wielded against dissenters in an effort to replace the "marketplace of ideas" with an ideological monopoly.

According to the non-partisan Foundation for Individual Rights in Education, which conducts the leading annual study on university speech policies, nearly sixty percent of the 427 public colleges and universities surveyed have an unconstitutional speech code. *Spotlight on Speech Codes 2014: The State of Free Speech on Our Nation's Campuses* 2 (2014), http://issuu.com/thefireorg/docs/2014_speech_code_report_final (last visited Feb. 28, 2014). The unique nature of the public university campus, where students often live on campus or spend most of their time there, means that students are often subject to these policies virtually every waking moment. *McCauley v. Univ. of V.I.*, 618 F.3d 232, 247 (3d Cir. 2010). Nearly every on-campus human interaction is regulated by these codes, and colleges are expanding the scope of these policies to restrict even off-campus and internet speech.[2]

Universities often argue that their speech codes are nothing more than legislatively and judicially approved anti-harassment policies. But the terms of these policies are much broader and enable colleges to restrict much more than sexual or racial harassment. Typically, these codes prohibit what

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[2] *See* Darryn Cathryn Beckstrom, Comment, *Who's Looking at Your Facebook Profile? The Use of Student Conduct Codes to Censor College Students' Online Speech*, 45 WILLAMETTE L. REV. 261 (2008) (discussing the rise of public university student conduct codes that regulate student speech off-campus and on the internet).

they term "offensive," "intolerant," "biased," "sexist," "hateful," or "uncivil" speech.[3] The subjectivity built into these codes allows colleges to punish speech based on the motivations of the speaker or the subjective reaction of listeners. Most college harassment policies violate this Court's holding in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), by allowing colleges to restrict harassment that is not severe, pervasive, or objectively offensive.

Left in place, these speech codes allow colleges to selectively prohibit unpopular speech based on the subjective whims of listeners or administrators. Thus, many students are left in free speech limbo as they question whether their speech will result in punishment. Consequently, they refrain from speaking out, leaving the "marketplace of ideas" to slowly disintegrate.[4]

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[3] For example, the University of Nevada-Las Vegas prohibits "disrespect for persons," and the University of Central Missouri prohibits impeding the "social experiences" of students. *Spotlight on Speech Codes* at 13. *See also, e.g., McCauley*, 618 F.3d at 248-49 (banning "offensive" speech); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (requiring students to "be civil"); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003) (prohibiting "acts of intolerance").

[4] It should be noted that this insidious chilling effect still occurs even if the college never actually intends to enforce its overbroad speech code against anyone. It is not unreasonable to assume that if a college has a policy on its books, it will enforce it. *See Act Now to Stop War & End Racism Coalition (ANSWER) v. District of Columbia*, 589 F.3d 433, 435–36 (D.C. Cir. 2009) (It is a "'conventional background expectation' that the government will enforce the law.")

II. PRE-ENFORCEMENT FACIAL CHALLENGES TO SPEECH CODES ARE CRITICAL FOR PRESERVING FREEDOM IN HIGHER EDUCATION.

From the inception of speech codes in the 1980s, courts have uniformly struck them down as unconstitutional, when they are able to reach the merits. *See McCauley*, 618 F.3d at 250, 252; *DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 392-93 (4th Cir. 1993); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 96-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.).

This combination of circuit and district precedent should have ended speech codes at universities across the nation, yet they continue to exist at the

majority of schools.[5] This means that the courts must still remain available to students attempting to protect their free speech rights.

A. Clarification Is Needed to Preserve Pre-Enforcement Challenges in First Amendment Cases, Especially For College Students and Facial Challenges.

Recently, some courts have applied reasoning similar to that of the Sixth Circuit below and rejected college students' facial challenges because they were not actually punished under the challenged speech code. This functionally prevents judicial review of clearly unconstitutional policies.

For example, in *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010), the Ninth Circuit held that a college student had failed to show a credible threat of enforcement and thus lacked standing to challenge a community college's broad sexual harassment policy. The student, however, had been threatened with expulsion by his professor after he made comments supporting traditional marriage and about his Christian religious beliefs during a class assigned speech. *Id.* at 782-83. In a subsequent assignment, the student wrote about free speech rights, and his professor wrote a reminder that he had "agreed to

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[5] Just last year, the United States Department of Education and the Department of Justice recommended a speech code blueprint to public universities nationwide. Letter from Anurima Bhargava, U.S. Dep't of Justice, et al., to Royce Engstrom, President of Univ. of Mont., et al. (May 9, 2013), http://www.justice.gov/crt/about/edu/documents/montanaletter.pdf.

abide by the Student Code of Conduct." *Id.* at 783. The student alleged in his complaint that he wished to discuss the topics of marriage, sexuality, and gender on campus from a Christian perspective. He refrained from doing so due to fear of punishment, given the broad language of the sexual harassment policy coupled with his prior experience with his professor. *Id.* at 784.

The college's sexual harassment policy prohibited

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions: ... (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.

Id. at 781.

The college's website went on to define sexual harassment as "generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. *Id.* at 782. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex," and advised students that "[i]f

[you are] unsure if certain comments or behavior are offensive do not do it, do not say it." *Id.*

Even though the policy applied to the student and reasonably applied to the speech he wanted to engage in, the Ninth Circuit concluded that Lopez lacked standing to challenge the policy because it had not actually been applied to him. It drew this conclusion despite the fact that he had been threatened with punishment as a result of his speech. *Id.* at 788-90. The result was that unless he was willing to try to violate the policy in order to invoke punishment, the student was barred from challenging it.

This result fundamentally contradicts the Court's jurisprudence on facial challenges in the First Amendment context, which makes clear that plaintiffs challenging the overbreadth of a speech-related restriction are not required to actually risk punishment in order to have standing. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *see id.* at 393 ("the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."); *see also Dombrowski*, 380 U.S. at 486 (recognizing the "sensitive nature of constitutionally protected expression," in permitting a pre-enforcement action involving the First Amendment).

Indeed, the high bar for standing in *Lopez* is contradictory to the underlying philosophy behind facial overbreadth challenges, where the potential harm to the plaintiff is secondary to the harm being

inflicted upon society as a whole. Facial challenges to overly broad statutes are

> allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court. [The plaintiff's] ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake.

Sec'y of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 958 (1984).

Lopez is not an isolated case. In *Rock for Life—UMBC v. Hrabowski*, 411 Fed. Appx. 541, 548-49 (4th Cir. 2010), the Fourth Circuit held that a pro-life student group lacked standing to challenge an overbroad sexual harassment policy, even though a university official serving as both in-house counsel and director of the department charged with enforcing the policies at issue had labeled their speech "emotionally harassing," a term found in one of the overlapping policies on campus prohibiting harassment. These speech codes used similar language, shared the same goals (*i.e.*, protecting students' emotional sensibilities), and punished the same behavior and expression. Based on the official's concern about the student group's speech being "emotionally harassing," the university moved the group's planned event to an isolated area of campus on the morning of the event. *Id.* at 544-45.

The student plaintiffs testified that given the broad language of the policies, and the censorship relating to their speech on the basis of it being "emotionally harassing," they felt chilled in expressing their views relating to abortion on campus. *Id.* at 548. The Fourth Circuit, however, found that the students lacked standing to challenge the sexual harassment policy despite the chilling effect on their speech because they had not been punished under the policy, making their claim of an injury in fact too attenuated. *Id.* at 548-49.

Citing to *Lopez*, the Fourth Circuit stated that "To demonstrate a credible threat that a sexual harassment policy is likely to be enforced in the future, a history of threatened or actual enforcement of the policy against the plaintiff or other similarly situated parties will often suffice. *Id.* at 548 (citing *Lopez*, 630 F.3d at 786). Thus, a plaintiff must either be specifically threatened with punishment, punished, or present facts showing someone similarly situated was threatened or punished in order to have standing to bring an overbreadth challenge. That does not sound much like a "pre-enforcement" challenge, and does not take into account the fact that the *chill* caused by overbroad policies is what gives rise to the injury in fact—the plaintiffs specifically do not want to have to guess how far they can push the envelope between threatened and actual punishment, and therefore avoid speaking in ways that might reasonably invoke the policy.

The reasoning in both *Lopez* and *Rock for Life*, like the present case, overlooks the injurious effect

an investigation can have on a plaintiff, even if the investigation does not ultimately result in actual enforcement or punishment. *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, is a good illustration of the harm that can be done even without an actual punishment under a speech code, and the facts are similar to this case in that they involve an investigation without enforcement.

In *College Republicans*, a student group held an anti-terrorism rally in which they defaced the flags of Hezbollah and Hamas in a symbolic response to the protests of these groups against the United States which include the burning of the United States flag. *Id.* at 1007-08. Unbeknownst to the students, the Arabic writing on these flags includes the name of Allah. The rally drew vehement protest and afterward, one student submitted a written complaint about the event stating that the students had acted with "incivility" in violation of a provision of the student code which stated, "students are expected to be ... civil to one another and to others in the campus community." *Id.* at 1008. This complaint prompted the university to first conduct an informal inquiry into the incident, and a university official decided to initiate a formal investigation which lasted several months. *Id.* at 1010.

After this lengthy period of bureaucratic limbo, the investigative panel found no wrongdoing pursuant to university policies and no punishment was issued. *Id.* Yet the court still assumed the plaintiffs had standing to challenge the policies at

issue, even though there were no additional complaints pending against them and even though they were not actually punished or found guilty of any wrongdoing. *Id.* at 1011. The university's argument that the language of the policy was merely hortatory was not convincing—the fact that it was in the student code amidst language relating to enforcement, as well as the fact that the language was the basis for the (ultimately fruitless) investigation, meant that the "students would have a reasonable basis to fear that the University might in fact seek to discipline them if the University felt that their conduct was not 'civil.'" *Id.* at 1017. As a result, a preliminary injunction was issued against a clearly overbroad and unconstitutional policy that restricted free speech on SFSU's campus—exactly the result that should occur in order to protect our most precious freedoms. *Id.* at 1024.

But under the Sixth Circuit's logic below, even being investigated as the College Republicans were would not be enough for standing. According to the lower court's reasoning, the investigation does not create a reasonable fear of punishment if the university merely finds probable cause to start an investigation—only an actual finding of guilt is enough. This overlooks the fact that the investigation itself causes an unacceptable chilling effect on the exercise of First Amendment rights. *See, e.g., White v. Lee,* 227 F.3d 1214, 1228-29 (9th Cir. 2000) (finding government investigation of HUD residents caused chilling effect on speech, even though no speech was curtailed by officials and no charges were ultimately brought). Asking students to incur punishment to be eligible to challenge

unconstitutional speech policies is inconsistent with this Court's precedent and the First Amendment.

B. Clarity on the Standing Requirements for Pre-Enforcement Facial Challenges Is Needed Because of Inconsistent Application in the Lower Courts.

The need for the Court to clarify the standing doctrine for these types of cases is further illustrated by the fact that there has been arbitrary and inconsistent application of the standing and ripeness doctrines in the lower courts—even within the same circuits.

1. There is inconsistency among the circuits.

In contrast to *Lopez* and *Rock For Life*, as discussed above, other circuits have applied the doctrine correctly. These courts have held that a student subject to a policy that restricts his or her speech on campus has Article III standing to challenge that policy on its face, even if the policy had not been applied to the student. *See Zamecnik v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874 (7th Cir. 2011); *McCauley*, 618 F.3d 232; *DeJohn*, 537 F.3d 301; *Saxe*, 240 F.3d 200; *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 251 (3d Cir. 2002) (finding Article III standing to challenge harassment policy as overbroad even though student was threatened with enforcement under a different policy); *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (professor had standing to challenge ad hoc committee's actions investigating

extent of his free speech rights because they were implied threats and chilled the professor's speech, even though the committee had no power to actually punish him and had not threatened to); *Trotman v. Bd. of Trustees of Lincoln Univ.*, 635 F.2d 216, 228-29 (3d Cir. 1980) (finding professors who received letters implicitly, but not overtly, threatening discipline had Article III standing to sue university for chilling speech). This means that a student's right to facially challenge a speech code is dependent upon their geographic location, which warrants the Court's clarification on this point.

2. There are inconsistencies within circuits.

Differences in the interpretation of standing doctrine are even found within circuits. For instance, the Ninth Circuit's standing analysis in *Lopez* contradicted its own precedent in *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002 (9th Cir. 2003). In *Bayless*, the Ninth Circuit held that a right-to-life political action committee, whose primary purpose was to present political advertising, had standing to challenge a state election statute that placed limitations on political advertising within ten days before an election, even though there was no indication that the statute would be enforced against it. *Id.* at 1006. The plaintiff was able to describe the specific speech it refrained from engaging in because the law was specific about the prohibited activity.

The *Lopez* panel attempted to distinguish *Bayless* by arguing that the student simply wasn't specific

enough about the speech he wanted to engage in that would violate the policy, since he neglected to give full details about "when, to whom, where, or under what circumstances' he will actually give a speech that would violate the sexual harassment policy." *Lopez*, 630 F.3d at 787 (internal quotation omitted).

But when dealing with a vague, overbroad policy restricting speech based on its content, such as a policy restricting "offensive" speech, plaintiffs cannot know exactly what speech might be punished under the policy. That is precisely why such policies are so pernicious—the chilling effect is substantial and far broader than any legitimate scope of the policy. A vague, overbroad policy causes people to self-censor far more speech than a policy with specificity. Thus, specificity did not justify the difference in outcomes between *Lopez* and *Bayless*. As it did in *Bayless*, the Ninth Circuit should have found Lopez had standing even though he had not been punished under the policy. In fact, Lopez had an even stronger case for standing because there was not even a general threat of sanction against the plaintiff in *Bayless*, whereas Lopez had been threatened with expulsion by his professor.

In *Rock For Life*, the Fourth Circuit contradicted its own precedent when it applied reasoning similar to *Lopez*. It had previously found a student had standing to facially challenge a policy that had never been applied to him. *See Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 257 (4th Cir. 2003) (holding middle school student had standing to facially challenge dress code that was never applied to him because he was subject to it at all times on campus).

In this case, the Sixth Circuit likewise failed to follow its own precedent. It rejected the plaintiffs' claims based on ripeness in part because they were never actually sanctioned under the law, but in *Dambrot v. Central Michigan University*, 55 F.3d 1177, the Sixth Circuit held that students had standing to challenge a speech code that was not applied to them and that they were not threatened with. In *Dambrot*, student members of the basketball team challenged the facial overbreadth of the university's policy on racial and ethnic harassment after the university fired their coach for using a racial slur in the locker room. *Id.* at 1182. The policy contained language similar to the speech code in *Lopez*. *See id.* (defining harassment as "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment"). The university never threatened enforcement of the policy against the students, nor did the students plead that they intended to violate the policy. *Id.* at 1182-83. They only pleaded that they occasionally used the same word that resulted in the coach's dismissal and feared similar punishment. *Id.* at 1180.

The *Dambrot* court affirmed the district court's finding that the students had Article III standing facially to challenge the harassment policy because the "overbreadth doctrine . . . allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain statute is so broad as to 'chill' the exercise of free speech and expression." *Id.* at 1182.

It found the lack of actual enforcement against the plaintiff students to be irrelevant. The students had Article III standing because the "text of the policy" stated that "language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university." *Id.* at 1183. The mere existence of such language presented a "realistic danger" of enforcement. *Id.*

The lack of consistency among (and within) circuits demonstrates the need for the Court to reiterate that litigants like college students have Article III standing to facially challenge overbroad speech policies.

CONCLUSION

Requiring students to demonstrate actual enforcement of an overbroad or speech-restrictive policy to establish an injury-in-fact sufficient for a facial challenge effectively bars courts from confronting the merits of these unconstitutional policies. Their chilling effect is unchecked unless the rare student is willing to gamble with their academic record (and their future career) to raise a challenge. Thus, it is critical that in examining this case, the Court should explicitly allow for pre-enforcement facial challenges to restrictive speech policies in a way that would enable students to challenge speech codes without risking punishment.

Respectfully submitted,

DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Ste. D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
dcortman@alliancedefendingfreedom.org

HEATHER GEBELIN HACKER
DAVID J. HACKER
ALLIANCE DEFENDING FREEDOM
101 Parkshore Drive, Ste. 100
Folsom, California 95630
(916) 932-2850

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST, *et al.*,
Petitioners,

v.

STEVEN DRIEHAUS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND, FREEDOM TO READ FOUNDATION, GREAT LAKES INDEPENDENT BOOKSELLERS ASSOCIATION, MOUNTAIN & PLAINS INDEPENDENT BOOKSELLERS ASSOCIATION, PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION, SOUTHERN INDEPENDENT BOOKSELLERS ALLIANCE, ANNIE BLOOM'S BOOKS, CHANGING HANDS BOOKSTORE, INC., HARVARD BOOK STORE, INC., PAULINA SPRINGS BOOKS, POWELL'S BOOKSTORE, INC., SCHULER BOOKS & MUSIC, TATTERED COVER, INC., THE KING'S ENGLISH, INC., WELLER BOOK WORKS, VILLAGE BOOKS, AND DARK HORSE COMICS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL A. BAMBERGER
Counsel of Record
RICHARD M. ZUCKERMAN
DENTONS US LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 768-6700
michael.bamberger@dentons.com

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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American Booksellers Association, American Booksellers Foundation For Free Expression, American Library Association, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation, Inc., Great Lakes Independent Booksellers Association, Mountain & Plains Independent Booksellers Association, Pacific Northwest Booksellers Association, Southern Independent Booksellers Alliance, (collectively the "Media *Amici*"), Annie Bloom's Books, Changing Hands Bookstore, Harvard Book Store, Inc., Paulina Springs Books, Powell's Bookstore, Inc., Schuler Books & Music, Tattered Cover, Inc., The King's English, Inc., Weller Book Works, Village Books (collectively the "Bookstore *Amici*") and Dark Horse Comics, Inc. respectfully submit this brief as *amici curiæ* in support of Petitioners.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiæ*, their members, their counsel, and Media Coalition Inc. (a 40-year old trade association of which many of the Media *Amici* are members) made a monetary contribution to its preparation or submission.

The parties' written blanket consents to the filing of *amicus* briefs have been filed with the Clerk of the Court.

INTEREST OF *AMICI*

The Media *Amici's* members, the Bookstore *Amici* and Dark Horse Comics, Inc. (collectively "*Amici*") write, create, publish, produce, distribute, sell, advertise in, and manufacture books, magazines, videos, sound recordings, motion pictures, interactive games, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.[2] Libraries and librarians whose interests are represented by *Amici* American Library Association ("ALA") and Freedom to Read Foundation ("FTRF") provide such materials to readers and viewers, whose First Amendment rights ALA and FTRF also defend.

Amici have a significant interest in preventing the imposition of unconstitutional governmental limitations on the content of, and access to, First Amendment-protected communicative materials, whether textual or visual.

All of the *Amici* have brought pre-enforcement actions in federal courts to assert the unconstitutionality of state and federal laws that infringe First Amendment rights.[3] Some of these

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[2] A description of each of *Amici* is attached as Appendix A.

[3] *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 844 (1997); *Virginia v. American Booksellers* *(cont'd)*

cases are discussed in detail below.

Amici also have filed *amicus* briefs in this Court

Ass'n, 484 U.S. 383 (1988); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010); *American Booksellers Foundation for Free Expression v. Strickland* 601 F.3d 622 (6th Cir. 2010); *PSInet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D. N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *American Booksellers Ass'n v. Schiff*, 868. F. 2d 1199 (10th Cir. 1989); *American Booksellers Ass'n v. Webb*, 919 F. 2d 1493 (11th Cir. 1990); *Trans-High Corp. v. Colorado*, 13-cv-01389 *and Tattered Cover, Inc. v. Brohl*, 13-cv-01431, 2013 WL 2500836 (D. Colo. June 11, 2013); *Florence v. Shurtleff*, No. 2:05cv000485 (D. Utah May 16, 2012); *American Booksellers Foundation for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011); *American Booksellers Foundation for Free Expression v. Coakley*, No. 10-11165, 2010 WL 4273802 (D. Mass. Oct. 26, 2010); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008); *Southeast Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d 389 (D.S.C. 2003), 371 F. Supp. 2d 773 (D.S.C. 2005); 233 F.R.D. 456 (D.S.C. 2006); *Shipley, Inc. v. Long*, 454 F. Supp. 2d 819 (E.D. Ark. 2004); *ACLU v. Goddard*, (formerly *ACLU v. Napolitano*) No. CIV 00-0505 TUC-AM (D. Ariz. Apr. 23, 2004; July 22, 2004); *Athenaco v. Cox*, 335 F. Supp. 2d 773 (E.D. Mich. 2004); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Village Books v. City of Bellingham*, No. C88-1470D (W.D. Wash. Feb. 9, 1989); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

addressing First Amendment issues, including the impact of speech regulations on creators, producers, distributors, retailers, and consumers.[4]

SUMMARY OF ARGUMENT

For more than three decades, under the clear precedents of this Court, *Amici* have known that when Congress or a State enacts a statute which impinges on their First Amendment rights, they need neither suffer the chilling effect on their speech, nor violate the statute and risk criminal prosecution, but could, instead—as long as their fear of prosecution was well-founded—bring a federal pre-enforcement challenge to the statute. The *Amici* have done just that, filing 23 pre-enforcement cases[5] which resulted in decisions either holding the statutes unconstitutional, *e.g.*, *American Booksellers*

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[4] *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Brown v. Entm't Software Ass'n*, 131 S. Ct. 2729 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Ashcroft v. ACLU*, *supra*; *Beard v. Banks*, 542 U.S. 406 (2004); *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001)*; *United States v. Playboy Entm't Group, 529 U.S. 803 (2000)*; *Denver Area Educ. Telecomms. Consortium v. F.C.C., 518 U.S. 727 (1996)*; *United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)*.

[5] *See* fn. 3.

Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986), or dramatically narrowing the statutes so that they did not violate the First Amendment, *e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), *certified questions answered*, 236 Va. 168, 372 S.E.2d 618 (Va. 1988), *vacated and remanded*, 488 U.S. 905 (1988) ("*Virginia v. American Booksellers*"). These cases have protected First Amendment rights from a broad range of threats—statutes which would have criminalized, among other things, non-obscene speech on websites and in adult-to-adult emails and other electronic communications, descriptions or depictions of violence or criminal conduct, posting non-obscene art and literature on websites, access to information about healthcare, and the physical display of non-obscene publications in bookstores and retail stores.

In some instances, these pre-enforcement cases holding statutes unconstitutional led to curative legislation—benefitting both the plaintiffs (whose First Amendment rights were protected) and the States (which were able to put a constitutional law in place), *e.g, American Booksellers Foundation for Free Expression v. Coakley*, No. 10-11165, 2010 WL 4273802 (D. Mass. Oct. 26, 2010).

These cases were brought in federal courts in

nine of the Circuits—including the Sixth Circuit.[6]

The decision of the Sixth Circuit in this case,[7] threatens to close the courthouse door to such First Amendment challenges, by imposing a standing requirement under which, in effect, a speaker must show that he or she has been silenced by a threat of prosecution that was both likely and imminent. Had that standing requirement been imposed in the pre-enforcement cases brought by Media *Amici* and Bookstore *Amici*, it is doubtful that *Amici*, as plaintiffs, could have sufficiently demonstrated standing. Without pre-enforcement challenges, these unconstitutional statutes would have stayed in place—chilling speech unless and until a speaker subjected himself or herself to criminal prosecution and litigated the unconstitutionality of the statute in the criminal case.

That decision below is contrary to the decisions of this Court, which recognize that speakers who have a well-founded fear of prosecution under a statute infringing First Amendment rights must be

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[6] In *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443 (6th Cir. 2009), defendants argued that plaintiffs lacked standing. The Sixth Circuit, without discussing standing, addressed the merits of the case and thus necessarily found that plaintiffs had standing.

[7] *Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. 2013).

accorded standing to bring a pre-enforcement challenge. This Court should reverse the decision below, and reiterate the principles of standing which have long protected First Amendment rights.

ARGUMENT

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FREEDOM OF SPEECH WILL BE IMPAIRED IF SPEAKERS WHO HAVE A WELL-FOUNDED FEAR OF PROSECUTION UNDER A STATUTE WHICH VIOLATES THE FIRST AMENDMENT ARE DENIED STANDING TO BRING A PRE-ENFORCEMENT CHALLENGE

For *Amici*, the issue of standing presented in this case is intensely practical: When faced with a statute which threatens their First Amendment rights, will these *Amici* (and others so affected) be able to bring pre-enforcement challenges? Or will they need to choose between subjecting themselves to criminal prosecution, or enduring the unconstitutional statute and engaging in self-censorship?

I. To Avoid Either Having Their Speech Chilled, or Subjecting Themselves To Criminal Prosecution, *Amici* Have Brought 23 Successful Pre-Enforcement Challenges To Unconstitutional Statutes

Over the past three decades, *Amici* have brought

23 successful pre-enforcement challenges to statutes which posed a threat to their First Amendment rights.[8]

A review of a sampling of these cases demonstrates not only the critical role that pre-enforcement challenges play in ensuring that First Amendment rights are not chilled and providing an opportunity to challenge a law that impinges on the First Amendment without subjecting oneself to criminal prosecution, but also the salutary effect of such challenges. These cases give states an opportunity to narrow their statutes to render them constitutional—either through construction by the State supreme court on a certified question, construction by a federal court based on argument by counsel for the State, or by remedial legislation.

Several of the cases brought by *Amici* were challenges to expansively drafted "harmful to minors" statutes—that is, statutes which restrict minors' access to sexually-explicit, non-obscene materials to which adults are entitled to have access under the First Amendment. This Court has long held—and *Amici* do not challenge—that such

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[8] In seventeen of the cases the challenged statute or ordinance was held unconstitutional; in five, it was narrowed to constitutional dimensions; in one, the ordinance was found unconstitutional in part and the remaining portion was narrowed to constitutional dimensions.

restrictions on minors' access are constitutional. *Ginsberg v. New York*, 390 U.S. 629, 634 (1968); *Miller v. California*, 413 U.S. 15 (1973); *Reno v. ACLU*, 521 U.S. 844, 864 (1997). However, if the method used to restrict minors' access to "harmful to minors" materials also restricts, or prevents, adults' access to such materials, the statutes can impinge upon the First Amendment rights of adults. Because such statutes focus on sexually explicit materials, overbroad statutes can unconstitutionally restrict adults' access to communications about healthcare, sexual health, and family planning (including pregnancy, pre-natal care, and access to abortion), as well as access to non-obscene art and literature.

And if the statutory language defining such materials is broader than permitted under *Miller/Ginsberg*, the statutes can impinge upon the First Amendment rights of minors.[9]

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[9] As this Court held in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2735-36 (2011), " '[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.' *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, *Ginsberg, supra*, at 640–641; *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed. 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription *(cont'd)*

Issues as to the constitutional breadth of "harmful to minors" statutes have arisen both in the bricks-and-mortar world, and, more recently, in the expansion of those statutes to online communications.

In *Virginia v. American Booksellers*, several of Media *Amici*, joined by booksellers and magazine distributors, brought a pre-enforcement First Amendment challenge to a Virginia "harmful to minors" statute (there denominated "harmful to juveniles") which made it unlawful for any person "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" certain visual or written sexual or sadomasochistic material that is harmful to juveniles. 484 U.S. at 383. *Amici* challenged both the "display" restrictions and the scope of the material that came within the statute's breadth.

This Court held that plaintiffs had standing to bring these pre-enforcement challenges, noting:

> [T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

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cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.' *Erznoznik, supra*, at 213–214."

484 U.S. at 392. This Court certified two questions to the Supreme Court of Virginia, which narrowly construed the statute to render it constitutional, holding that a book cannot be deemed harmful to juveniles "if it has serious value for a legitimate minority of juveniles, and in this context, a legitimate minority may consist of older, normal (not deviant) adolescents," and holding that there was a *scienter* element in the statute, so that, in order to be convicted of violating the statute, a bookseller must have "knowingly afforded juveniles an opportunity to peruse harmful materials in his store or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed, took no reasonable steps to prevent the perusal of such materials by juveniles." *Virginia v. American Booksellers Ass'n*, 372 S.E.2d 618, 624-25 (Va. 1988).

Thus, because a pre-enforcement challenge could be made, the chilling effect was avoided, the booksellers were able to challenge the constitutionality of the statute without risking criminal prosecution, and Virginia was able to narrow the statute so that it would not be constitutionally infirm.[10]

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[10] Similarly, in *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443, 447 (6th Cir. 2009), the Sixth Circuit certified a question to the Ohio Supreme Court relating to the scope of the State's "harmful to minors" statute, as applied to Internet communications. The Ohio Supreme *(cont'd)*

In *American Booksellers Foundation for Free Expression v. Coakley*, several of *Amici* and other parties (including an online photographic not-for-profit organization and a licensed marriage and family therapist), as plaintiffs, brought a pre-enforcement challenge to a Massachusetts statute which, in expanding a "harmful to minors" statute to electronic communications, used such sweeping language that brought within its scope a wide range of non-obscene communications among adults. The district court issued a preliminary injunction against the statute, holding that the law was overly broad because it "proscribe[s] a substantial amount of constitutionally protected speech" when judged "in relation to the statute's plainly legitimate sweep." 2010 WL 4273802, at *4, quoting from *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003).

The Massachusetts legislature promptly amended the statute to cure the constitutional defect

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Court issued an opinion stating that the statute applied only to personally directed electronic communications and that it did not apply to generally accessible communications. *American Booksellers Foundation for Free Expression v. Cordray*, 922 N.E.2d 192, 195 (Ohio 2010). The Sixth Circuit held that the statute, as thus limited by a definitive decision of the State's highest court, was constitutional. *American Booksellers Foundation for Free Expression v. Strickland*, 601 F.3d 622 (6th Cir. 2010). The chilling effect was thus eliminated, as was the risk that a prosecutor would take a broader view of the statute.

by, among other things, adding a provision that:

> A person who disseminates an electronic communication or possesses an electronic communication with the intent to disseminate it shall not be found to have violated this section unless he specifically intends to direct the communication to a person he knows or believes to be a minor.

Mass. St. 2011, c. 9, § 19 (eff. April 11, 2011) (codified as Mass. Gen. Laws, Ch. 272 § 28). Days later, the preliminary injunction was vacated on consent, and the action was dismissed.

Less than nine months elapsed from the filing of the complaint to the Massachusetts legislature's enactment of a curative amendment. The pre-enforcement challenge not only eliminated the chilling effect of an unconstitutional statute, but resulted in the enactment of an amended statute which would withstand constitutional scrutiny if challenged by a criminal defendant who, with specific intent, used electronic communications to disseminate "harmful to minors" materials to a person he knew or believed to be a minor.

Trans-High Corp. v. Colorado, No. 13-cv-01389 *and Tattered Cover, Inc. v. Brohl,* No. 13-cv-01431, 2013 WL 2500836 (D. Colo. June 11, 2013) did not involve a "harmful to minors" statute. In those cases, several of *Amici* and other parties brought a pre-enforcement challenge to a Colorado penal statute which would have restricted the display and sale of magazines focused on marijuana at the same time that Colorado legalized the sale of marijuana for non-medical use. The statute was so broad and so vague that it would have made it a crime to display

copies of magazines such as *State Legislatures* and *Governing* which gave substantial coverage to the Colorado referendum and statute decriminalizing marijuana.

After the complaints were filed, the State of Colorado readily conceded that the provisions of the statute restricting the display and sale of magazines violated the First Amendment. A permanent injunction was entered, on consent, less than two weeks after the action was filed.

In *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, an Indianapolis ordinance, while not criminal by its terms, attempted by threat of civil sanction, fines and damages to punish the production, sale or distribution of materials that depicted or constituted the "sexually explicit subordination of woman" (defined to include women depicted or described in scenarios of degradation, positions of servility or submission).Under the statute, a complaint could be brought by any "woman acting against the subordination of women" and could result in the issuance of a cease and desist order against further sale, distribution or performance. The form of ordinance (characterized as an anti-pornography civil rights ordinance) was highly promoted and publicized, having been drafted by a well-known law professor and a leading feminist activist and writer.

Several of *Amici* and other parties, including an association of college stores, a distributor of motion picture videos, and a distributor of books and magazines, were concerned about the breadth and vagueness of the scope of the ordinance, which appeared to cover much art and literature, both

classic and modern. They brought a pre-enforcement challenge. The district court found that plaintiffs had standing and held the ordinance unconstitutional, as did the Seventh Circuit. This Court affirmed. *American Booksellers Ass'n v. Hudnut,* 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd* 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986). In addition to alleviating the threat to plaintiffs' First Amendment rights without forcing them to risk fines and penalties, the highly visible, successful, pre-enforcement challenge discouraged attempts to pass laws similar to the ordinance in other States and municipalities, thus conserving judicial resources.

In *Big Hat Books v. Prosecutors,* 565 F. Supp. 2d 981 (S.D. Ind. 2008), several of *Amici* and other parties, including individual bookstores and the Indianapolis Museum of Art, brought a pre-enforcement challenge to an Indiana statute requiring registration with a $250 filing fee by all persons (individuals and businesses) who sell any "harmful to minors" materials. Since such materials cannot be sold to minors, the statute was directed at those who sold such materials to adults, who are entitled under the First Amendment to purchase them. The district court held that the registration mandate failed strict scrutiny and that the fee was content-based. The statute was thus unconstitutional under the First Amendment.

In *Southeast Booksellers Ass'n v. McMaster,* 371 F. Supp. 2d 773 (D.S.C. 2005), several of *Amici* and other parties (including an art center) brought a pre-enforcement challenge against a South Carolina statute expanding that state's "harmful to minors" statute to electronic communications, such that it

restricted non-obscene protected communications among adults. The district court held the legislation unconstitutional, noting that:

> this action mirrors a wealth of cases challenging, on First Amendment grounds, state and federal statutes which resemble the Act. Federal courts have unanimously concluded that these acts are unconstitutional.

371 F. Supp. at 781 (citations omitted).

In the case of a highly publicized proposed statute as in *Hudnut, supra*, a judicial finding of unconstitutionality may stifle further attempts of passage. On the other hand, in many cases it is irrelevant. The failure of legislators to consider constitutionality can often be explained by political expedience. The "blame" for striking a politically popular bill can be passed to the judiciary.[11] The resulting proliferation of unconstitutional legislation in the various States further highlights the importance of pre-enforcement challenges in the protection of First Amendment rights.

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[11] *See* Michael Bamberger, Reckless Legislation: How Legislators Ignore the Constitution (Rutgers Univ. Press 2000), at 7-8.

II. *Amici* Were Able To Bring These Pre-Enforcement Challenges Because This Court Has Consistently Recognized That a Plaintiff Who Has a Well-Founded Fear of Prosecution Based on an Intent to Engage in Activity Arguably Protected by the First Amendment Has Standing

Amici were able to bring these pre-enforcement challenges because this Court has recognized that, when First Amendment rights are at issue, evaluating whether there is the "actual or threatened injury" sufficient to establish standing[12] entails consideration of two potential injuries.

First, there is the injury which attends the threat of enforcement. As the Court has repeatedly

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[12] Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin* 422 U.S. 490, 498 (1975). To clear that hurdle, a party who invokes a federal court's authority must show that (1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). In cases involving pre-enforcement challenges based on First Amendment claims, the issue is the first of these requirements—actual or threatened injury. The latter two requirements—tracing an injury to the unconstitutional statute, and the effectiveness of redress by the court—are easily satisfied.

explained, it is not necessary that a person expose himself to arrest or prosecution under a statute in order to challenge that statute in a federal court. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Epperson v. Arkansas*, 393 U.S. 97 (1968). A credible threat of present or future prosecution itself works an injury that is sufficient to confer standing, even if there is no history of past enforcement. *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

The second type of injury is peculiar to the First Amendment context. In such cases, an actual injury exists when the plaintiff is chilled from exercising its right to free expression or forgoes expression in order to avoid enforcement consequences. *Meese v. Keene*, 481 U.S. 465, 473 (1987). The publicity caused by a criminal charge, even if ultimately proven to be baseless, is harmful to the reputation of a person or business. In such situations the mere existence of the allegedly unconstitutional statute forces the speaker toward self-censorship. *Virginia v. American Booksellers*, 484 U.S. at 393.

The Court, in *Virginia v. American Booksellers*, recognized the unique danger from the mere existence of unconstitutional speech-suppressive statutes on the books:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them.

Ibid. This has been the test for standing in First Amendment challenges ever since, during which time *Amici* have successfully sustained pre-enforcement challenges in federal district courts in nine of the Circuits. *Amici*'s standing, as plaintiffs, has been regularly upheld on the basis that they had an actual and well-founded fear of prosecution.

There are also prudential reasons in favor of the *Virginia v. American Booksellers* test for standing in First Amendment challenges. The mere existence of such an unconstitutional statute on the books, even prior to enforcement, results in restriction of protected speech. As this Court held in *Virginia v. American Booksellers,*

> [T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm than can be realized even without an actual prosecution.

484 U.S. at 393. That holding recognizes—as does the language of the First Amendment, "Congress shall *make no law* ... abridging the freedom of speech ..." (emphasis added)—that when a speech-suppressive law is enacted, the injury is sustained by the *making* of the law, and not only if and when it is later enforced.

The decision of the Sixth Circuit in this case applies a different standard—a standard which undermines the First Amendment. The Sixth Circuit held that Susan B. Anthony List lacked standing because it had not shown that it was "*likely* that the Commission *will threaten* SBA List with prosecution *anytime soon.*" 525 Fed. Appx. at 420 (emphasis added). But under *Virginia v. American Booksellers,* it is not necessary for a speaker to show that

prosecution is *likely* or *imminent*. It is, instead, sufficient to show that, "The State has not suggested that the ... law will not be enforced." 484 U.S. at 393.

And the Sixth Circuit dealt with the chilling effect dismissively, noting that SBA List had continued to engage in the speech at issue, and has proclaimed "We will simply not be intimidated into silence." 525 Fed. Appx. at 423. But standing is based on the "danger ... of self-censorship," *Virginia v. American Booksellers,* 484 U.S. at 393, inherent in a statute which punishes speech, not on a subjective determination of whether, or to what extent, a particular speaker is willing to engage in the speech and risk prosecution with the statute in place.

Nothing in this Court's decisions supports the Sixth Circuit's view that standing to bring a pre-enforcement challenge to a law which violates the First Amendment is limited to persons who can show that they have been silenced by the likely threat of imminent prosecution.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be **reversed.**

Dated: February 28, 2014

MICHAEL A. BAMBERGER
Counsel of Record
RICHARD M. ZUCKERMAN
Dentons US LLP
1221 Ave. of the Americas
New York, NY 10020
212-768-6700

Attorneys for Amici Curiæ

APPENDIX

APPENDIX A

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AMICI CURIÆ

The following *amici curiæ* join this brief:

The Media *Amici*

American Booksellers Association, founded in 1900, is a trade organization devoted to meeting the needs of its core members - independently owned bookstores with storefront locations nationwide - through education, information dissemination, business products and services, and advocacy. ABA represents more than 1,700 bookstores operating in 2,000 locations throughout the country. ABA exists to protect and promote the interests of independent retail book businesses, as well as to protect the First Amendment rights of every American.

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

American Library Association ("ALA"), established in 1876, is a nonprofit professional organization of more than 67,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover, paperback, and electronic books in every field, scholarly and professional journals, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Great Lakes Independent Booksellers Association is a trade association representing and promoting the independent booksellers located in Illinois, Indiana, Michigan and Ohio. It was formed in 1989 in response to censorship legislation proposed in Michigan.

The Mountain & Plains Independent Booksellers Association is a trade association supporting independent booksellers in Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, Texas, Utah and Wyoming.

The Pacific Northwest Booksellers Association is a trade association representing the interests of literacy, free speech and independent bookselling in Alaska, Idaho, Montana, Oregon and Washington.

The Southern Independent Booksellers Alliance is a trade association that empowers, promotes and celebrates independent booksellers in Alabama, Arkansas, Florida, Georgia, Kentucky Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

The Bookstore *Amici*.

Each of the Bookstore *Amici* and their owners believes in the exercise and protection of rights under the First Amendment.

Bluejay, Inc. d/b/a/ Paulina Springs Books is a corporation organized under the laws of the State of Oregon, which operates bookstores in Sisters and Redmond, OR, as well as having an online retail presence.

Changing Hands Bookstore, Inc. is a corporation organized under the laws of the State of Arizona, which operates a bookstore in Tempe, AZ, as well as having an online retail presence.

Harvard Book Store, Inc. is a corporation organized under the laws of the Commonwealth of Massachusetts, which operates a bookstore in Cambridge, MA, as well as having an online retail presence.

Historic Fairhaven Retail Associates is a corporation organized under the laws of the State of Washington, operating a bookstore under the name Village Books in Bellingham, WA, as well as having an online retail presence.

Old Multnomah Book Store Ltd. is a corporation organized under the laws of the State of Oregon, which operates a bookstore under the name Annie Bloom's Books in Portland, OR, as well as having an online retail presence.

Powell's Bookstore, Inc. is a corporation organized under the laws of the State of Oregon, which operates bookstores under the name Powell's Books in Portland, OR, as well as having an online retail presence.

Sam Weller's Books is a corporation organized under the laws of the State of Utah, which operates a bookstore under the name Weller Book Works in Salt Lake City, UT.

Schuler Books, Inc. is a corporation organized under the laws of the State of Michigan, which operates bookstores under the name Schuler Books & Music in Grand Rapids and Lansing, MI.

Tattered Cover, Inc. is a corporation organized under the laws of the State of Colorado, which operates bookstores in Denver and Highlands Ranch, CO, as well as having an online retail presence.

The King's English, Inc. is a corporation organized under the laws of the State of Utah, which operates a bookstore under the name King's English Bookshop in Salt Lake City, UT, as well as having an online retail presence.

Dark Horse Comics, Inc., a corporation organized under the laws of Oregon, is the third-largest comics publisher in the United States. Dark Horse and its owners believe in the exercise and protection of rights under the First Amendment.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 13-193

Supreme Court, U.S.
FILED
FEB 28 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST, ET AL.,

Petitioners,

—v.—

STEVEN DRIEHAUS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Steven R. Shapiro
Counsel of Record
Lee Rowland
Brian M. Hauss
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Freda J. Levenson
Drew S. Dennis
American Civil Liberties Union of Ohio Foundation
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2220

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Ohio is a statewide affiliate of the national ACLU and filed an *amicus* brief in this case in the District Court. Since its founding in 1920, the ACLU has frequently appeared before this Court in free speech cases, both as direct counsel and as *amicus curiae*, including cases where this Court has upheld pre-enforcement review of laws that chill protected speech. *See, e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *United States v. Stevens*, 559 U.S. 460 (2010). The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members.

STATEMENT OF THE CASE

Section 3517.21 of the Ohio Revised Code makes it a crime for any person, "during the course of any campaign" to "knowingly and with intent to affect the outcome of such campaign" either "[m]ake a false statement concerning the voting record of a candidate or public official" or "[p]ost, publish, circulate, distribute, or otherwise

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[1] Petitioners and the State Respondents have filed blanket letters of consent to the submission of *amicus* briefs. Respondent Driehaus has submitted a letter indicating that he is no longer participating in this case. None of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." Ohio Rev. Code §§ 3517.21(B)(9)–(10). Enforcement of these crimes must begin with a filing before the Ohio Elections Commission, and any person may file such a complaint. *Id.* §§ 3517.21(C); 3517.153(A), (C). The Commission may then review, investigate, hold a hearing, and recommend action, including criminal prosecution, in response to a complaint. *Id.* §§ 3517.153–157. The Commission may also directly impose a fine. *Id.* § 3517.155. The penalty for a violation of Section 3517.21 is imprisonment for up to six months, a fine of up to $5,000, or both. *Id.* § 3517.992(V).

Petitioner Susan B. Anthony List ("SBA List"), an anti-abortion organization, wished to erect a billboard opposed to the congressional candidacy of Respondent Driehaus in the 2010 general election, charging that Driehaus had "voted FOR taxpayer-funded abortion." Pet. App. 3a. Driehaus believed the statement was false, and his counsel both filed a complaint with the Commission and sent a letter threatening legal action against the billboard owner, who then refused to post SBA List's message. *Id.* A designated panel of the Ohio Elections Commission "voted 2–1 to find probable cause and referred Driehaus's complaint to the full Commission." Pet. App. 4a. SBA List then filed the instant action in the District Court, challenging the constitutionality of the Ohio statutes banning false campaign statements. The court denied preliminary relief, and

stayed the action while the Commission proceedings were pending. Pet. App. 5a.

After the complaint was filed in federal court, Driehaus and SBA List jointly agreed to postpone the Commission hearing until after the election; however, Driehaus lost the election and moved to withdraw his complaint, with the agreement of SBA List. SBA List then amended its lawsuit to argue that the Commission proceedings had chilled its campaign speech, and "stated its intent to engage in 'substantially similar activity in the future.'" *Id.* Petitioner Coalition Opposed to Additional Spending & Taxes ("COAST") separately wished to engage in similar speech accusing Driehaus of funding abortion and directly criticizing the Ohio Elections Commission's inquiry. *Id.* Unlike SBA List, however, COAST declined to "publish these messages because its knowledge of the Commission proceedings against SBA List chilled its ability to speak." Pet. App. 6a. Right before the 2010 election, COAST also filed a federal action against Ohio's false statement statutes. The two organizations' complaints were then consolidated by the District Court.[2]

On the parties' cross-motions for dismissal and summary judgment, the District Court dismissed all of Petitioners' claims, finding them non-justiciable. First, the District Court held that Petitioners' claims

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[2] COAST also amended its Complaint to add a challenge to Section 3517.20(A)(2) of the Ohio Revised Code, which requires a disclaimer identifying the entity responsible for any "political communication." *Id.* § (A)(2)(a). That provision has not yet been evaluated by the lower courts or deemed critical to the question of justiciability.

were not ripe, because there was no "concrete application of state law" to the Petitioners after SBA List's Commission inquiry had terminated, and there could be no hardship to SBA List where the organization itself consented to the complaint's dismissal. Pet. App. 27a, 57a–58a. Second, the court held that Petitioners lacked standing because a chill on speech is not an injury-in-fact, and enforcement of the false statement law was not imminent. Pet. App. 33a–34a, 60a–61a. Finally, the court briefly considered the question of mootness, holding that because SBA List consented to the dismissal of the Commission process, its claims were moot. Pet. App. 35a. The court accordingly concluded that the claims of both organizational Petitioners in the consolidated case were non-justiciable.

The Sixth Circuit affirmed the District Court's conclusion that Petitioners' claims were not justiciable, but focused exclusively on the question of ripeness. In keeping with Sixth Circuit precedent, but differing significantly from other circuits and this Court, the court held that "chill alone – without some other indication of imminent enforcement – d[oes] not constitute injury in fact." Pet. App. 9a–10a (quoting *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012)). The court ruled that the harms experienced by SBA List "– the billboard rejection and the probable-cause hearing – do not help it show an imminent threat of *future* prosecution." Pet. App. 10a. The court also cited the following factors in support of its determination that SBA List's claim was unripe: that any citizen could initiate a Commission inquiry, Pet. App. 12a; that Driehaus himself had moved to Africa, Pet. App. 14a; and that SBA maintained the truth of its statements, failing

to allege the requisite "intent to disobey the statute," Pet. App. 8a, 14a–15a. The court held, without substantial discussion, that the same analysis applied to COAST. Pet. App. 18a.

SUMMARY OF THE ARGUMENT

This case involves a challenge to a state law that imposes a direct, content-based restriction on political speech, whether by a candidate or (as here) members of the public, during the course of an election campaign. The First Amendment interests at stake are obvious and significant. The impact of the law on Petitioners' speech is equally clear from the record. The lower courts nonetheless found that Petitioners' claims were non-justiciable. That conclusion cannot be reconciled with this Court's well-established rules for determining justiciability in a First Amendment context, and should be reversed.

Justiciability involves the interplay of three related doctrines: standing, ripeness, and mootness. This brief concentrates on the ripeness doctrine, which was the focal point of the Sixth Circuit's decision, and also briefly discusses the questions of standing and mootness.

In contrast to the Sixth Circuit's reliance on ripeness, this Court has primarily relied on standing and mootness to assess whether claims of the sort raised here – challenging overbroad laws on First Amendment grounds due to their chilling effect – are properly presented for judicial review. The Sixth Circuit's focus on ripeness was, therefore, misguided from the outset. But, even taken on its own terms, its decision that Petitioners' claims were not ripe for

review cannot be sustained under this Court's well-established rules for determining ripeness.

First, there is no need in this case for further factual development. Second, the chill that Petitioners have identified as their principal harm is both substantiated by the record and not contingent on anything other than the fact that the challenged Ohio law remains in full effect. Third, the contention that any claims for prospective relief will not be ripe until the next election ignores the inherently time-limited yet recurring nature of electoral contests.

As a matter of standing and mootness, the justiciability issues in this case are straightforward and easily resolved. Petitioners have standing to litigate this pre-enforcement challenge because they have a credible fear of prosecution demonstrated by both the probable cause finding against SBA List and the State's continued enforcement of the challenged statute. And, Petitioners' First Amendment claims are not moot because they are capable of repetition yet evading review, an exception to mootness that this Court has repeatedly invoked when considering laws regulating election-related speech.

ARGUMENT

I. PETITIONERS' FIRST AMENDMENT CHALLENGE IS RIPE FOR JUDICIAL REVIEW.

The ripeness doctrine is meant "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387

U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)). When, as in this case, an overbroad statute chills core election-related speech, that harm is not abstract; it is recurring, urgent, and ripe for adjudication. To hold otherwise would risk insulating unconstitutional statutes regulating election speech from proper judicial review, and inhibit speech that lies at the heart of the First Amendment's protections.

To determine whether a case is ripe for judicial review, a court must evaluate: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *see also, e.g.*, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Here, both factors support the conclusion that Petitioners' claims are ripe. First, the issues in this case are fit for judicial decision, both because the contours of Petitioners' chill-based First Amendment challenges require no further factual development and because Petitioners will experience the same chilling of their core political speech during every election cycle. Second, given that even the momentary loss of First Amendment freedoms constitutes irreparable injury, any delay of judicial review will impose a significant and irrevocable hardship on the parties and others whose political speech is directly impeded by this unconstitutional statute.

A. Petitioners' First Amendment Challenge Is Fit for Judicial Decision.

The fitness of a claim for judicial resolution turns on two considerations. First the court must analyze whether the plaintiff's claim "would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978). Relatedly, the court must determine whether the claim rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Union Carbide*, 473 U.S. 568, 580–81 (1985)) (internal quotation marks omitted).[3] In this case, both analyses suggest that Petitioners' claims were, and remain, fit for judicial review.

First, further factual development is unnecessary given the predominately legal nature of Petitioners' challenge and their past experience under the challenged Ohio law. Where a statute is attacked on broad legal grounds, such as facial invalidity, significant factual development of the plaintiff's particular claim is ordinarily unnecessary. *See, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (noting that facial

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[3] The Sixth Circuit addresses this issue as an independent factor in the ripeness analysis. *See* Pet. App. 8a–16a. This Court's precedents, however, make clear that contingency is properly analyzed as part of the fitness inquiry. *See, e.g., Texas*, 523 U.S. at 300; *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 162–64 (1967).

Takings Clause challenges to regulations "are generally ripe the moment the challenged regulation or ordinance is passed"); *Pacific Gas & Elec. Co.*, 461 U.S. at 200–02. *But see Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 (further factual development was required when plaintiff's facial challenge relied on "specific characteristics of certain types of concession contracts" affected by the law). Here, Petitioners have raised facial vagueness and overbreadth challenges to the Ohio election law, neither of which requires significant factual development. *See Renne v. Geary*, 501 U.S. 312, 323–24 (1991); *Able v. United States*, 88 F.3d 1280, 1287, 1290 (2d Cir. 1996); *ACORN v. City of Tulsa*, 835 F.2d 735, 739–40 (10th Cir. 1987). Nor do Petitioners' as-applied claims, contending that the Ohio law violates the First Amendment as applied to individuals or organizations taking "positions on political issues," require additional factual development. Here, Petitioners have unequivocally demonstrated their intent to engage in political speech, and there is no question that the statute has been interpreted to apply to such speech. *See, e.g.*, *McKimm v. Ohio Elections Comm'n*, 729 N.E.2d 364 (Ohio 2000).

Moreover, the demonstrated impact on Petitioners' campaign-related speech under the Ohio law provided a fully adequate factual context for adjudication of their overbreadth and vagueness claims at the time this case was filed. Both SBA List and COAST wished to engage in campaign speech related to Congressman Driehaus's vote in favor of the Affordable Care Act. Petitioner SBA List was unable to purchase a billboard to display its message because the billboard owner was threatened with legal proceedings under the challenged statute. SBA

List was itself dragged before the Ohio Elections Commission to defend the veracity of its statements, requiring it to retain counsel and disclose sensitive membership information. Meanwhile, Petitioner COAST refrained from speaking entirely, out of concern that it would be prosecuted under the statute for speech materially similar to SBA List's.

These same facts also provide enough context to resolve Petitioners' request for prospective relief enjoining enforcement of the challenged statute in future elections, where the same issues are likely to arise again. *Cf. Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (holding that a pro-life group's First Amendment challenge to a federal election statute's blackout provision was justiciable because the group credibly claimed that it intended to run advertisements with similar subject matter during future elections). Nor are the facts likely to develop more fully with respect to any future election, given the risks of self-censorship and the inherently transitory nature of election campaigns. As this Court has observed, "[c]hallengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300 n.12 (1979). For that reason, "[j]usticiability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election." *Id.*; *see also Wisconsin Right to Life*, 551 U.S. at 462. By ignoring this principle, the Sixth Circuit's overly stringent ripeness analysis effectively precludes any judicial review of Ohio's election-related speech laws.

Petitioners also meet the requirements of the second prong of the fitness inquiry. Although it is certainly possible that they will not be prosecuted for making false statements in subsequent elections, the harms they allege are not purely contingent upon hypothetical future events. As this Court recognized in *Virginia v. American Booksellers Association, Inc.*, the harm of self-censorship "can be realized even without an actual prosecution." 484 U.S. 383, 393 (1988). That harm will come into play every election cycle, so long as the Ohio statute remains on the books. *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) ("Plaintiffs' alleged injury is not based on speculation about a particular future prosecution or the defeat of a particular ballot question. Rather, the injury is speech that has already been chilled and speech that will be chilled each time a school funding initiative is on the ballot because of the very existence of section 211B.06."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1092, 1098 (10th Cir. 2006) (en banc) (rejecting a ripeness challenge on the grounds that plaintiffs' injury was "already occurring," because the challenged provision "by its very existence, chills the exercise of the Plaintiffs' First Amendment rights"); *cf. Wisconsin Right to Life*, 551 U.S. at 463–64 (holding that the plaintiff did not need to allege that it would engage in *identical* political speech in future elections to demonstrate that its First Amendment fell under the capable of repetition yet evading review exception to mootness). These chill-based harms are not contingent on anything other than the fact that the Ohio law remains in full force.

B. The First Amendment Claims in This Case Present a Recurring, Irreparable, and Severe Hardship.

As this Court has made clear on numerous occasions, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Judicial concern over the irretrievable loss of chilled speech weighs heavily in the ripeness analysis. *See, e.g.*, *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008); 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3532.3 n.35 & accompanying text (3d ed. 2014) (collecting cases); *see also Renne*, 501 U.S. at 325–26 (Stevens, J., concurring) (stating that "the case would unquestionably be ripe" if the plaintiffs had alleged that the challenged state constitutional provision chilled their own speech). Indeed, "the extent of the chill upon first amendment rights induced by vague or overbroad statutes," such as the one at issue here, "is the most significant factor in determining whether an otherwise premature or abstract facial attack . . . is ripe for decision." *Martin Tractor Co. v. Federal Election Comm'n*, 627 F.2d 375, 384 (D.C. Cir. 1980) (collecting cases).

In such cases, the plaintiffs represent not only their own interests, but the interests of numerous other individuals whose speech has been chilled by the challenged statute. "For in appraising a statute's inhibitory effect upon (First Amendment) rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *Bigelow v. Virginia*, 421 U.S.

809, 816 (1975) (quoting *NAACP v. Button*, 371 U.S. 415, 432 (1963)). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977); *cf.* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 847–848 (1970). Neither court below considered the impacts of the challenged law on third parties, or to the health of Ohio's political conversation. To the contrary, both courts treated Petitioner COAST's claims of acute chill to its First Amendment freedoms dismissively, in a manner distinctly at odds with this Court's tradition of addressing and preventing such "irreparable injury." *Elrod*, 427 U.S. at 373.

Judicial sensitivity to the harms caused by delaying resolution of chill-based First Amendment claims is particularly acute where, as here, the speech at issue concerns an election. *See, e.g.*, *Babbitt*, 442 U.S. at 300 n.12 ("There is value in adjudicating election challenges notwithstanding the lapse of a particular election because '[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.'" (quoting *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974))); *Stout*, 519 F.3d at 1116 (holding that the principle that one need not await the consummation of threatened injury to obtain preventative relief "is particularly true in the election context").

This special solicitude for election-related speech is a function of both its central status under the First Amendment, *see, e.g.*, *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966), and the recognition that it is particularly difficult to review election-related

speech regulations under normal justiciability standards, *see Renne*, 501 U.S. at 332 (White, J., dissenting) (collecting cases). Indeed, if Petitioners cannot bring a pre-enforcement challenge against the Ohio statute now, it is doubtful they will ever have sufficient opportunity to challenge it. *See, e.g.*, *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 334 (2010) ("By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is 'capable of repetition, yet evading review.'"). Thus, delaying resolution of Petitioners' claims would cause serious, irreparable, and recurring harm to the parties and the public interest.

Petitioners have already suffered significant hardships under the Ohio election law. As discussed above, SBA List has experienced difficulty finding venues to disseminate its message because vendors are afraid of prosecution under the challenged statute, and has had to expend valuable resources during the campaign to defend itself in pre-prosecution administrative proceedings before the Ohio Elections Commission. COAST, on the other hand, so fears the Sword of Damocles that it has opted to refrain from speaking rather than risk liability under the law. The Sixth Circuit's casual indifference to these harms means that, every election cycle, Petitioners, other Ohio political organizations, and even individual speakers will have to decide whether their political convictions are strong enough to risk prosecution. This Court's precedents, however, make clear that such a choice cannot be compelled as a prerequisite to judicial

review. *See Babbitt*, 442 U.S. at 302 ("[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge the statute.'" (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

Having established that the text of the Ohio election statute casts an ongoing and objectively reasonable chill on core election-related speech, Petitioners present claims fit for adjudication. Given the singular harms that flow from the inhibition of campaign speech, their claims not only are ripe, but urgently demand review.

C. The Sixth Circuit's Ripeness Analysis Risks Insulating Laws That Inhibit Core Political Speech from Judicial Review.

As the Sixth Circuit's opinion correctly observed, the concepts of standing, ripeness, and mootness are closely related and may be addressed in any order. Pet. App. 6a–7a. This Court, while also noting this overlap, has consistently found challenges to laws that chill election-related speech to be justiciable. Taking pains to ensure that laws inhibiting political speech do not evade proper judicial review, this Court has recognized that a credible fear of prosecution for engaging in protected speech is presumed to supply justiciability. *See, e.g.*, *Babbitt*, 442 U.S. at 298–99; *id.* at 302 ("Appellees are thus not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity. In our view, the positions of the parties are sufficiently adverse with respect to

the consumer publicity provision proscribing misrepresentations to present a case or controversy within the jurisdiction of the District Court."); *Renne v. Geary*, 501 U.S. 312, 325 (1991) (Stevens, J., concurring) ("[I]f the complaint had alleged that these organizations wanted to endorse, support, or oppose a candidate for nonpartisan office but were inhibited from doing so because of the constitutional provision, the case would unquestionably be ripe").

In contrast to this Court's flexible approach to the justiciability of chill-based First Amendment injuries, the Sixth Circuit held simply that Petitioners' claims were unripe because "prior injury, without more, is not enough to establish prospective harm." Pet. App. 9a. This misapplication of the ripeness doctrine contradicts this Court's approach in any context, *see, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987) ("the fact that Hill has already been arrested four times under the ordinance lends compelling support to the threat of future enforcement"), but is particularly troubling when it involves speech in the election cycle. The Sixth Circuit committed error by holding that the repeat nature of the election cycle undermined, rather than underscored, the justiciability of Petitioners' claims. And it compounded this error when it reasoned that Petitioners' claims failed the ripeness test because the object of their speech, Respondent Driehaus, had moved to Africa after the election and was unlikely to run again as an Ohio candidate. Pet. App. 14a ("The degree of speculation required to consider Driehaus a present threat is fatal to SBA List's claimed fears."). In requiring that a continuing, identical relationship between all parties survive the length of litigation for claims to remain ripe, the Sixth Circuit's analysis

effectively *guarantees* that campaign-related free speech claims will always become "unripe" between elections.

This Court's precedent affirms the impropriety of applying the ripeness analysis to *prevent* review of laws that inhibit political speech, and demonstrates that a more flexible justiciability standard is appropriate. However, even among courts that do opt to apply ripeness analysis in facial free speech challenges, the principle that First Amendment challenges are "particularly apt to be found ripe" is black letter law. 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3532.3 (3d ed.) ("First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill.") (collecting cases); *see also, e.g.*, *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) ("The customary ripeness analysis outlined above is, however, relaxed somewhat in circumstances such as this where a facial challenge, implicating First Amendment values, is brought."). The Sixth Circuit's application of the doctrine improperly omitted any consideration of the harm inflicted by vague or overbroad regulation of campaign speech, or the dangers to our democratic system when such laws continually evade judicial review.

II. PETITIONERS HAVE STANDING TO RAISE A PRE-ENFORCEMENT CHALLENGE.

Having dismissed Petitioners' claims on ripeness grounds, the Sixth Circuit did not separately address the question of standing. That question, however, is easily answered in Petitioners' favor.

Because the harm of self-censorship "can be realized even without an actual prosecution," *American Booksellers*, 484 U.S. at 393, this Court has consistently held that pre-enforcement First Amendment challenges to criminal statutes are justiciable, so long as the "fear of criminal prosecution under [the] allegedly unconstitutional statute is not imaginary or wholly speculative," *Babbitt*, 442 U.S. at 302. *See also id.* at 299 & n.11. This Court has also made clear that a credible threat of prosecution exists, for justiciability purposes, where "the State has not disavowed any intention of invoking the criminal penalty provision." *Id.* Thus, in *American Booksellers*, this Court was "not troubled" by the pre-enforcement nature of the plaintiffs' First Amendment challenge to a state law restricting the display of sexually explicit materials because "[t]he State ha[d] not suggested that the newly enacted law [would] not be enforced," and there was "no reason to assume otherwise." 484 U.S. at 393. Likewise, in *Holder v. Humanitarian Law Project*, the Court allowed pre-enforcement review of the federal government's criminal prohibition against providing material support to designated foreign terrorist organizations because "[t]he Government has not argued . . . that plaintiffs will not be prosecuted if

they do what they say they wish to do." 130 S. Ct. 2705, 2717 (2010).

Here, there can be little doubt that Petitioners face a credible threat of future enforcement proceedings and/or prosecution. Far from disavowing the challenged statute, Ohio continues to enforce it regularly. *See, e.g., Krikorian v. Ohio Elections Comm'n*, No. 1:10-CV-103, 2010 WL 4117556, at *2 (S.D. Ohio Oct. 19, 2010); *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 631 (6th Cir. 2005); *The Team Working for You v. Ohio Elections Comm'n*, 754 N.E.2d 273, 276 & n.2 (Ohio Ct. App. 2001); *State v. Davis*, 499 N.E.2d 1255 (Ohio Ct. App. 1985); *see also Doe v. Bolton*, 410 U.S. 179, 188–89 (1973) (holding that ongoing enforcement proceedings support justiciability). Moreover, the Ohio Elections Commission previously conducted pre-prosecution proceedings against Petitioner SBA List. During those proceedings, a panel of the Commission determined that probable cause existed to believe that SBA List had violated the statute. Although these prior enforcement proceedings terminated before the full Commission had decided whether to refer SBA List's case for prosecution or otherwise sanction the organization, they nevertheless lend "compelling support to the threat of future enforcement." *Hill*, 482 U.S. at 459 n.7 (1987).

Unlike the Sixth Circuit, the District Court did reach the question of standing, holding that Petitioners lack standing to challenge the Ohio law because they allege that their intended speech is true and does not violate the challenged false statement

law.[4] *See* Pet. App. 34a, 60–61a. However, although plaintiffs raising a pre-enforcement challenge ordinarily must allege an intent to engage in conduct that violates the challenged statute, *see, e.g.*, *Babbitt*, 442 U.S. at 298, that rule does not apply to pre-enforcement First Amendment challenges against statutes proscribing false speech. Especially in the contentious world of political debate, the threat of prosecution for making a false statement may very well inhibit speakers from making true statements. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."); *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) ("[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that

---

[4] The District Court also provided two additional reasons for disregarding this Court's precedents regarding the justiciability of pre-enforcement First Amendment challenges: (1) the Ohio false statement statute does not proscribe any constitutionally protected speech; and (2) the Ohio Elections Commission "lacks the power to initiate prosecution in false statement cases." Pet. App. 61a; *see also* Pet. App. 34a. The first rationale was flatly rejected in *United States v. Alvarez*, 132 S. Ct. 2537 (2012). The second rationale presents an incomplete picture of the statutory framework. Under Ohio law, the Commission is the sole gateway to prosecution for violation of the false statement statute, Ohio Rev. Code § 3517.21, and if the Commission finds probable cause for such violation, the Commission may *directly* impose a fine or refer the case for prosecution. *Id.* § 3517.155. Since *amicus curiae*'s focus is the Sixth Circuit's ripeness rationale, this brief does not further address these erroneous holdings by the District Court, neither of which factored into the Sixth Circuit's decision.

lies at the First Amendment's heart."); *id.* at 2564 (Alito, J., dissenting) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern" create a "grave and unacceptable danger of suppressing truthful speech.").

That is why this Court has repeatedly held that "First Amendment freedoms need breathing space to survive." *Citizens United*, 558 U.S. at 329 (quoting *Wisconsin Right to Life*, 551 U.S. at 469). *See also Gertz*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters"). To honor our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), this Court has cautioned against allowing the government to criminally regulate the veracity of speech on matters of politics.

For example, in *Babbitt*, this Court held that the plaintiff could raise a pre-enforcement challenge to a statute prohibiting unions from encouraging boycotts through the use of "dishonest, untruthful and deceptive publicity," even though the plaintiffs alleged that they did "not plan to propagate untruths," because the plaintiffs were "not without some reason in fearing prosecution for violation of the ban." 442 U.S. at 301–02. *See also 281 Care Comm.*, 638 F.3d at 628–31 (holding that the plaintiffs had reasonable cause to fear prosecution under a false statements statute, even though they did not intend to make any false statements, because they intended to engage in conduct that could

reasonably be interpreted as making a false statement). Similarly here, Petitioners face a credible threat of prosecution under the Ohio law if they choose to speak in subsequent elections. Requiring Petitioners to await prosecution in order to challenge the Ohio statute would inappropriately force them to choose between silence and risking criminal liability for speech they deem to be true. *See Steffel*, 415 U.S. at 459 ("[I]t is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.").

III. THE CONSTITUTIONAL HARM CAUSED BY AN OVERBROAD RESTRICTION ON CAMPAIGN SPEECH REPEATS EACH ELECTION CYCLE, AND PETITIONERS' CHALLENGE IS THEREFORE NOT MOOT.

The protection of political speech lies at the zenith of the First Amendment's protections. *See, e.g., Citizens United*, 558 U.S. at 329. This protection includes the judicial review of statutes that cast a chill on protected speech. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). It is therefore critical to employ a procedural doctrine that reflects the weighty constitutional issues at stake when laws restrain campaign speech, directly or indirectly.

This Court has long recognized that while an expiration of the underlying action that triggered a lawsuit may ordinarily render a case moot, there are

"broader consideration[s]" at play when a case is "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911) (case was not moot despite termination of administrative process). Where a government agency retains power to restrain First Amendment rights, this Court has refused to "decline to address the issues . . . on grounds of mootness," particularly where the underlying orders are "by nature short-lived." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976).

As discussed above, speech particular to a single candidate or election is by its very nature short-lived.

> "There are short timeframes in which speech can have influence .... The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit."

Citizens United, 558 U.S. at 334. Therefore, when questions about the continuing justiciability of election-related speech claims have arisen, this Court has properly addressed them by flexibly applying the mootness doctrine – and its exceptions – to allegations of chill.

For example, in *Wisconsin Right to Life*, plaintiffs challenged political speech restrictions in a case that spanned three election cycles, during which

their specific campaign messages fell out of date. Rather than find the case moot or unripe, the Court took a pragmatic approach that recognized the difficulty of obtaining full judicial review of speech within the timeframe of a single election:

> [G]roups like WRTL cannot predict what issues will be matters of public concern during a future blackout period. In these cases, WRTL had no way of knowing well in advance that it would want to run ads on judicial filibusters during the BCRA blackout period. In any event, despite BCRA's command that the cases be expedited "to the greatest possible extent," *two* BCRA blackout periods have come and gone during the pendency of this action.

Wisconsin Right to Life, Inc., 551 U.S. at 462 (emphasis in original) (citation omitted). Thus, although the plaintiffs' particular injury ended after the election occurred during the pendency of judicial proceedings, the Court held that challenges to campaign speech regulations "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review," because the plaintiffs intended to run similar ads in future elections and there was no reason to believe that the FEC would refrain from prosecuting future violations. *Id.* at 463. *See also Davis v. Federal Election Comm'n*, 554 U.S. 724, 735 (2008). The facts here are remarkably similar.

Again unlike the Sixth Circuit, the District Court briefly touched on mootness in the instant case. The court found that "SBA List took affirmative

acts to moot this case" by agreeing to the scheduling and dismissal of the Ohio Elections Commission's review. Pet. App. 35a. *See also* Pet. App. 2a ("Driehaus and SBA List chose to terminate the state proceeding before the Commission adjudicated the dispute."). The lower courts' requirement that plaintiffs expend resources to voluntarily complete the adverse Commission process directly contrasts with this Court's well-established rule that litigants need not subject themselves to prosecution in order to maintain the right to challenge an unconstitutional law. This general rule applies with at least equal force in the election context. *See Davis v. Federal Election Comm'n*, 554 U.S. 724, 735 (2008) (holding that the capable of repetition yet evading review mootness exception applies to campaign speech, even when all election-related enforcement has terminated). This Court has recognized the inherent unfairness of requiring parties to expend considerable resources in futile actions for the sole purpose of preserving the right to have their claims heard. *See Citizens United*, 558 U.S. at 334.[5]

Challenges to restrictions on campaign communications are presumptively capable of repetition, yet evading review. The mootness doctrine therefore has built-in protections to ensure that restraints on core political speech do not repeatedly chill political debate while escaping the eye of the courts. The Sixth Circuit's ripeness analysis was made in error. Application of the mootness doctrine

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[5] *Cf. Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 500 (1982) ("[W]e have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies").

and its prudential exception instead would have led to the proper conclusion that recurrent harms to free speech are fully justiciable.

CONCLUSION

The judgment below should be reversed.

Respectfully Submitted,

Steven R. Shapiro
Counsel of Record
Lee Rowland
Brian M. Hauss
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Freda J. Levenson
Drew S. Dennis
American Civil Liberties Union of Ohio Foundation
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2220

AMICUS CURIAE BRIEF

RECORD
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BRIEFS

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IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST, AND COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, AND JON HUSTED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF BIOETHICS DEFENSE FUND IN SUPPORT OF PETITIONERS

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
Counsel of Record
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, AZ 85254
(504) 231-7234
dbordlee@bdfund.org

Counsel for Amicus Curiae

March 3, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTIONS PRESENTED

This brief will answer the following question:

Whether the Affordable Care Act ("ACA") authorizes taxpayer funding of abortion, such that assertions equating a political candidate's vote for the ACA with a vote for taxpayer-funded abortion are truthful.

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STATEMENT OF INTEREST[1]

Amicus curiae, Bioethics Defense Fund (BDF), is a non-profit legal and educational organization whose mission is to advocate for law in the service of life by applying the relevant legal, scientific and medical arguments that uphold the intrinsic dignity of the human person.

BDF's interest in the matter before this Court arises from its public education efforts about the workings of the Patient Protection and Affordable Care Act ("ACA") in relation to pro-life issues. From the introduction of the first bill in mid-2009 to the final passage of the ACA in March of 2010, BDF attorneys carefully read and analyzed each of the various bills for the purpose of educating citizens about the abortion permissive provisions hidden behind changing and often cryptic legislative jargon. With an express policy to neither support nor oppose any particular legislation, BDF limited its activities to public education efforts.

Following passage of the ACA, BDF served as lead counsel on an amicus brief to this Court in *NFIB v. Sebelius*, No. 11-398/11-398/11-400. Representing seven medical organizations, and co-counseled with four other national pro-life organizations, the brief set forth the scheme of the abortion premium mandate in Section 1303 of the ACA in relation to the individual mandate, 26 U.S.C.A. § 5000A.

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[1] The parties have submitted to the Clerk blanket consents to the filing of all amicus briefs. No counsel or party has authored any part of this brief, nor contributed monetarily the brief's preparation or submission. No person or entity, other than the amicus curiae or its counsel has made any monetary contribution to the preparation or submission of the brief.

This case is of central concern to *Amicus* Bioethics Defense Fund because it relates to truthfulness of public education assertions about how and whether particular legislation allows for taxpayer funding of abortion.

SUMMARY OF ARGUMENT

This brief addresses the underlying question of whether the Patient Protection and Affordable Care Act ("ACA") authorizes taxpayer funding of abortion. As set forth below, the answer is "yes." Therefore, assertions equating a political candidate's vote for the ACA with a vote for taxpayer-funded abortion are truthful.

Speculation is no longer required. The various phases of implementation of the ACA have provided concrete instances where taxpayer dollars have been authorized to directly fund abortion or subsidize health plans that cover elective abortion. Yet, confusion persists not only because the complexity of the statutory framework, but also because the relevant case law and the bill's drafting history–both essential to understanding the ACA's authorization of abortion funding–are obviously not set forth in the text of the Act.

The jurisprudential context in which the ACA was passed, discussed in Section A(1) of this brief, shows that beginning with Medicaid, federal statutes authorizing funding of general health services and health coverage have been consistently construed by courts to compel coverage of abortions essentially without restriction, except when Congress explicitly prohibits such subsidies.

The well-publicized drafting history of the ACA, summarized in Section A(2), shows that a Hyde-like

amendment adopted by the House of Representatives was repeatedly stripped and thwarted.

Section A(3) of the brief explains that abortion funding is not precluded by the Hyde Amendment, by Executive Order 13535, or by any provision of the ACA. Section A concludes that neither the ACA nor the related Executive Order contain language that would prohibit the bill's multiple self-appropriated funding streams from being used for abortion funding or for subsidies of health plans that included elective abortion.

This brief then outlines four non-exhaustive examples. The first two involve authorization for the use of taxpayer funding of abortion in federal programs, namely, in the Pre-existing Condition Insurance Plan program (discussed in Section B(1)) and in Community Health Centers (discussed in Section B(2)).

The remaining two examples involve provisions that authorize federal subsidies for private health plans that cover elective abortion purchased in the state and federal Exchanges. Section C(1) explains the abortion surcharge imposed without exception in subsidized plans that include abortion, even on objecting enrollees who later discover that they cannot decline abortion coverage in their plan even though it was hidden by the ACA's secrecy clause. Section C(2) briefly addresses federal subsidies of health plans that are required by the HHS Mandate to include abortifacient drugs and devices.

Taken alone, any of the four examples would provide ample basis to validate the truthfulness of an assertion that a vote for the ACA was a vote for federal funding of abortion. But these examples do not

represent an exhaustive list. The deliberate absence of any bill-wide Hyde-type restriction, combined with the vast discretionary power that the ACA granted to the Secretary of Health and Human Services explains why concrete examples of ACA enabled taxpayer-funded abortion continue to surface. *See, e.g.*, Cong. Chris Smith, *Of 112 Obamacare Plans for Congress and Staff, 103 are Pro-Abortion* (Dec. 3, 2013) (contrary to long-established Hyde Amendment prohibitions, federal employee insurance plans now cover elective abortion).

Petitioner Susan B. Anthony List seeks to challenge Ohio Revised Code Section 3517.21(B) as unconstitutional because it chills even truthful speakers from engaging in core political speech. Yet, the decision below concluded that Susan B. Anthony List's challenge is not ripe, even though the Ohio elections commission concretely constrained core political speech after erroneously labeling their assertions as false. The decision below should be reversed.

ARGUMENT

I. THE AFFORDABLE CARE ACT AUTHORIZES BOTH FEDERAL FUNDING OF ABORTION AND SUBSIDIES OF PRIVATE HEALTH PLANS THAT COVER ABORTIONS

This Court has repeatedly recognized that speech on the great political issues of the day lies at the core of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976). Speech on the practice and public funding of abortion is, therefore, so quintessentially political that it must necessarily elicit the greatest protection offered by the First Amendment.

The case at issue did not originate from a disagreement on the morality or legality of abortion, but rather from the seemingly elusive question of whether taxpayer funding of abortion is authorized by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("ACA," "PPACA," or "the Act").

In the context of this case, questions about the truthfulness of Petitioner's assertions—that candidates who voted for the ACA voted for taxpayer funded abortion—began when the Ohio elections commission stated in a one-page letter, without supporting reasoning, that the panel found "probable cause" to believe that such speech violated Ohio's false-statement law.[2]

A District Court judge subsequently agreed, stating, "The express language of the PPACA does not provide for tax-payer funded abortion. That is a fact and it is clear on its face." *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 435-36 (S.D. Ohio 2011).

But these conclusions are superficial, and therefore, erroneous; they ignore both the jurisprudential context in which the ACA was enacted, and the Act's drafting history showing that the ACA was passed without abortion limiting language.[3]

Therefore, the final Act did not—and still does not—contain a Hyde-like amendment that limits abortion

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[2] *Letter of Ohio Elections Commission to Susan B. Anthony List* (October 18, 2010).

[3] *See, e.g., Affidavit of Douglas D. Johnson*, at ¶¶ 7-11, 21, 26, at JA 81-82, 87-88 ("the Johnson Affidavit").

funding across the entire Act. This has resulted in continued attempts in the House of Representatives to add Hyde-like language, especially in light of "recent developments" that "underscore a need to correct the abortion funding problems" in the ACA.[4]

As explained below, the ACA consequently allows for the direct and indirect funding of abortion, and this reality is not remedied by the Hyde Amendment, any language in the ACA, or by the hollow Exec. Order No. 13535, § 3, 75 Fed. Reg. 15599 (Mar. 24, 2010).

A. The ACA is contrary to the two principles of the Hyde Amendment, and the President's Executive Order Does Not Provide a Fix for the Act's Lack of a Hyde-Like Amendment

Amicus' on-going careful review of the ACA in light of its drafting history and jurisprudential context leads us to agree with and adopt the legal analysis of the Office of General Counsel of the U.S. Conference of Catholic Bishops (USCCB) issued in a memorandum dated March 25, 2010, the day after the passage of the

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[4] As recently as January 28, 2014, the House passed H.R. 7, the "No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act," with a bi-partisan vote of 227-188 (House Roll Call No. 30). In congressional testimony in support of H.R. 7, Richard M. Doerflinger, a representative of the U.S. Conference of Catholic Bishops, said that recent developments "underscore a need to correct the abortion funding problems" in the ACA. USCCB, *Bishops Official Voices Support for 'No Taxpayer Funding for Abortion Act* (Jan. 10, 2014), http://www.usccb.org/news/2014/14-005.cfm. It is also telling that more than a year after the passage of the ACA, the President threatened a veto of the "No Taxpayer Funding for Abortion Act," H.R. 3, passed on May 4, 2011, discussed *infra* in Section A(2).

ACA and the signing of the corresponding Executive Order.[5]

That memorandum clarifies that there are two parts to the Hyde Amendment. *See* Omnibus Appropriations Act, 2009, Div. D, tit. V, § 507 (in effect at the time of the ACA's passage). The first provides that no appropriated federal funds can be used for *elective abortion services*.[6] *Id.* § 507(a). The second provides that no such funds can be used to pay for *health insurance coverage* that includes such abortions. *Id.* § 507(b). The ACA is contrary to both parts of this policy, and the Executive Order does not provide a remedy.

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[5] Anthony Picarello and Michael Moses, *Legal Analysis of the Provisions of The Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection* (March 25, 2010), http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/health-care-memo-re-executive-order-final-2010-03-25-pdf-09-03-48.pdf ("USCCB Memo of March 25, 2010"). With the permission of counsel, *Amicus* has utilized significant portions of this memo verbatim.

[6] Throughout this memo, the phrase "elective abortion" will be used to refer to abortions that have long been ineligible for federal funding in major health programs—that is, all abortions except for cases of rape, incest, or danger to the life of the mother. The term is used here as shorthand for a longstanding federal policy, not as an expression of a medical or moral judgment.

1. Courts Have Consistently Interpreted Congressional Statutes Authorizing the Provision of Broad Health Services to Compel Abortion Funding, Unless Congress Expressly Excludes It

Courts have held that when Congress authorizes the provision of comprehensive health services, it *must* pay for "medically necessary abortions,"[7] except insofar as Congress *expressly* excludes abortion funding. *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634, 637-38 (6th Cir. 1996) (holding that a state's refusal to pay for "medically necessary" abortions for which federal funding is not expressly barred by Congress violates Medicaid's general requirement that the state provide medically necessary services).

This issue originally arose in the context of Medicaid in the 1970s. In the years before the Hyde Amendment was first enacted by Congress in 1976, Medicaid was required to pay for about 300,000

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[7] In the abortion context, "health" has been construed broadly to include any abortion undertaken for physical, emotional, psychological, familial, or age-related reasons relevant to the well being of the patient. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). Under this broad definition, it has long been interpreted that virtually any abortion a physician is willing to perform can be deemed "medically necessary." *See* John T. Noonan, Jr., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 12 (1979); *see also* Douglas Johnson, Statement to the House, Subcommittee on Health, Committee on Energy and Commerce, *Testimony on the Protect Life Act of 2011*, Hearing, at 4 and n.6 (February 9, 2011), http://www.nrlc.org/uploads/ahc/ProtectLifeActDouglasJohnsonTestimony.pdf. Citation to Mr. Johnson's statements throughout this brief are for purposes of legal analysis, and not to indicate Amicus' endorsement of any past or pending legislation.

abortions a year.[8] "Because abortion fits within many of the mandatory care categories, including 'family planning,' 'outpatient services,' 'inpatient services,' and 'physicians' services,' Medicaid covered medically necessary abortions between 1973 and 1976," even though the Medicaid statute itself never used the word "abortion." *Engler*, 73 F.3d at 636. If broad language of this type were not read as mandating payment for abortion, there would have been no need for Congress to include the Hyde Amendment as a rider to the annual the Department of Health and Human Services (HHS) appropriations bill each year for the last 38 years.

Since *Engler*, courts have repeatedly and consistently interpreted statutory language that describes relatively broad categories of medical services to compel—not just *allow*, but *compel*—abortion funding. *See, e.g., Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 427 (5th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996); *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497, 502-03 (8th Cir. 1995), *rev'd in part on other grounds*, 516 U.S. 474 (1996); *Hern v. Beye*, 57 F.3d 906, 910-13 (10th Cir.), *cert. denied*, 516 U.S. 1011 (1995). *See also Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980) (holding

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[8] *Id.*, Johnson Testimony at 4, n.4; The Hyde Amendment is the most successful domestic "abortion reduction" policy ever enacted by Congress. *Id.* at 18 ("There is abundant empirical evidence that where government funding for abortion is not available under Medicaid or the state equivalent program, at least one-fourth of the Medicaid-eligible women carry their babies to term, who would otherwise procure federally funded abortions."); *see also* National Committee for Human Life Amendment, *The Hyde Amendment* 3 (April 2008), http://www.nchla.org/datasource/ifactsheets/4FSHydeAm22a.08.pdf.

that the Hyde Amendment substantively modified the Medicaid Act so that a state's refusal to pay for Hyde-eligible abortions violated the Act); *Hodgson v. Bd. of County Com'rs*, 614 F.2d 601, 608 (8th Cir. 1980) (holding that a state's refusal to pay for Hyde-eligible abortions was not based on a uniform standard of medical need as required by the Medicaid statute); *Zbaraz v. Quern*, 596 F.2d 196, 199 (7th Cir. 1979) (holding that a state's refusal to pay for Hyde-eligible abortions was "unreasonable" and "inconsistent with the objectives of the [Medicaid] Act" in violation of the Act), *cert. denied*, 448 U.S. 907 (1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126, 134 (1st Cir.) (same), *cert. denied*, 441 U.S. 952 (1979).

In this jurisprudential context, the ACA expressly enacted only one narrow statutory ban on the direct funding of abortion with federal taxpayer dollars appropriated under the Act. Namely, the ACA provides for grants to school-based health centers, and at the same time defines those centers so that they "do[] not perform abortion services." ACA, § 4101. But this leaves all remaining federal funds appropriated under the Act without Hyde-like restrictions—which means that under the cases noted above those funds *must* be used to pay for abortions where the statutory language describing the services is broad enough to encompass abortion.

2. Hyde-like abortion restrictions do not apply to the ACA because of the rejection of the Stupak Amendment and the Nelson-Hatch Amendment, and the adoption of the Manager's Amendment.

Along with the ACA's statutory structure and jurisprudential context, the Act's drafting history

confirms that the ACA dramatically changed decades of federal law by authorizing taxpayer funded elective abortion. *See Burgess v. United States*, 553 U.S. 124, 133 (2008) ("The drafting history of the CSA reinforces our reading of [that statute]"); *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) (citing the "evolution of [RICO's] statutory provisions" as an aid to statutory construction, and adding, "[w]here Congress includes [certain] language in an earlier version of the bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended.")

The Hyde Amendment is a rider that applies only to funds appropriated through the annual HHS appropriations bill because of the pertinence of abortion policy to the federal Medicaid program that is funded primarily through that bill.

By its very terms, the Hyde Amendment only applies to appropriations to which the Amendment is attached. Omnibus Appropriations Act, 2009, Div. D, tit. V, § 507 (a) & (b) (stating that "[n]one of the funds appropriated in *this* Act ... shall be expended for any abortion" or "for health benefits coverage that includes coverage of abortion") (emphasis added).

The ACA as enacted (Public Law 111-148) authorized multiple new streams of federal funding, and also contained multiple provisions that directly appropriated large sums for new or expanded health programs (such as the federal programs discussed below). These "direct appropriations" were outside the regular funding pipeline of future HHS appropriations bills and therefore are entirely untouched by the Hyde Amendment, even if one assumed that the

Hyde Amendment would be renewed for each successive fiscal year in perpetuity.[9]

Because of this legal landscape, the legislative action committees of several pro-life organizations "informed members of Congress that any health care restructuring bill that created new health programs and new funding streams must also include a permanent prohibition on the use of those programs and funds for elective abortion."[10]

However, as detailed in the Johnson Affidavit, *supra* n. 3, the final passage of the ACA did not include any language even remotely similar to the Hyde limitation, including the Stupak-Pitts Amendment which had been adopted onto a previous version of the bill by a bipartisan vote of 240-194. House Roll Call No. 884 (Nov. 7, 2009). The Stupak-Pitts Amendment was bill-wide and permanent because it was not contingent on any requirement for perpetual annual renewal. That amendment stated in part, "No funds authorized or appropriated by this Act (or an amendment made by this Act) may be used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion, except in the case where a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself, or unless the pregnancy is the result of an act of rape or incest." *Id.* at ¶ 12, JA 82-83.

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[9] *Affidavit of Douglas D. Johnson, National Right to Life Committee*, supra, n. 3, at ¶¶ 8, JA 81.

[10] *Id.* at ¶ 10, JA 82.

After the majority abandoned the House bill containing the Stupak Amendment, Senators Ben Nelson and Orrin Hatch failed in their effort to add a nearly identical amendment to the substitute Senate version of the bill that ultimately was enacted as the ACA. The Nelson-Hatch amendment was supported by NRLC and other pro-life organizations because it tracked the Stupak language, stating in part, "No funds authorized or appropriated by this Act (or an amendment made by this Act) may be used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion, except in the case where a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering condition caused by or arising from the pregnancy itself, or unless the pregnancy is the result of an act of rape or incest." The Nelson-Hatch Amendment was tabled on a vote of 54-45, and therefore did not become part of the ACA as enacted. Senate Roll Call No. 369 (Dec. 8, 2009)

Instead, so-called "compromise" language known as a "manager's amendment" was considered and adopted on December 21, 2009. Sometimes referred to as the "Nelson-Boxer language," the amendment created Section 1303 relative to a program to subsidize the purchase of health plans that contain coverage for elective abortion, as discussed *infra*, in Section C of this brief. NRLC characterized the new (and now final) "manager's amendment" as follows: "The new abortion language solves none of the fundamental abortion-related problems with the underlying Senate bill, and it actually creates some new abortion-related problems... The abortion-related language violates the principles of the Hyde Amendment by requiring the

federal government to pay premiums for private health plans that will cover any or all abortions." *Id.* at ¶ 20, JA 86-87.

As late as March 19, 2010, Congressman Stupak, joined by ten original cosponsors (including Respondent Driehaus), introduced a formal resolution, H. Con Res. 254, to prohibit the Senate-passed health bill from being enacted without abortion limiting language. That resolution, if enacted, would have removed objectionable language added by the manager's amendment (dealing with the premium subsidy program), and would have added bill-wide, permanent prohibitions on any provision of the bill from being used by administrative decree to authorize abortion funding or subsidies.

House Speaker Nancy Pelosi did not agree to allow a vote on the Stupak resolution/amendment. Mr. Stupak and some (but not all) of the other lawmakers in the "Stupak group" then abandoned their resistance and voted to send H.R. 3590 to President Obama for his signature. House Roll Call No. 165 (Mar. 21, 2010).

Congressman Stupak and some of the other Congress members in his group justified their votes by leaning heavily on the hollow claims regarding the content of Executive Order 13535, signed by President Obama on March 24, 2010, and more fully discussed below.

No subsequent enactment by Congress has modified any provisions of the ACA that authorize abortion funding policy. To the contrary, when the "No Taxpayer Funding for Abortion Act," H.R. 3, passed the House on May 4, 2011, with a bipartisan vote of 251-175, the President threatened a veto. *See* Executive Office of the President, *Statement of*

Administration Policy: H.R. 3, No Taxpayer Funding for Abortion Act (May 2, 2011) ("The Administration will strongly oppose legislation that unnecessarily restricts women's reproductive freedoms and consumers' private insurance options. If the President is presented with H.R. 3, his senior advisors would recommend that he veto the bill."), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr3r_20110502.pdf.

The federal programs discussed in Section B of this brief therefore allow taxpayer funding of abortion, and, as discussed below, the Executive Order does not and cannot provide any enforceable fixes.

3. The President's Executive Order Contains No Operative Provisions to Prohibit Taxpayer Funding of Abortion in the ACA

The very need for an Executive Order to purportedly limit the funds appropriated in the ACA evidences that the Act itself does indeed allow for taxpayer-funding of elective abortion.[11] *See* JA 88. The problem is the Executive Order was a meaningless act; it has no operative provisions to prohibit taxpayer funded abortion.

It is telling that in the wake of the passage of the ACA, Cecile Richards, the president of Planned Parenthood Federation of America (PPFA), the nation's largest abortion provider, characterized the

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[11] Moreover, the Hyde Amendment itself, which the Order purports to apply, authorizes federal funds to pay for abortions at least in some cases (such as rape or to protect the life of the mother), making assertions about abortion funding factually true regardless.

Executive Order as "a symbolic gesture."[12] Harvard Law professor Lawrence Tribe called it "magic" that "amounts to a signing statement on steroids."[13]

These characterizations are consistent with the careful analysis of the USCCB Memo of March 25, 2010, *supra* n. 5, which concludes that "none of the provisions of the Order represent valid fixes to those shortcomings" concerning abortion funding and subsidies.

Exec. Order No. 13535, § 3, 75 Fed. Reg. 15599 (Mar. 24, 2010), in its operative sections, superficially references only two of the abortion-related components of the bill. Regarding the abortion premium-subsidy program, Section 2 of the Executive Order does little more than reiterate the statutory language, under which federal tax-based subsidies will help pay for health plans that cover elective abortions (addressed in Section C of this brief). In Section 3 of the Order, involving Community Health Centers, the Executive Order purports to prohibit the use of funds appropriated under one narrow section of the Act for abortions—but this component of the order is not enforceable, since it lacks a foundation in the language of the statute itself.

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[12] *Statement of Cecile Richards, President of PPFA, on House Passing Historic Health Care Reform Bill* (March 25, 2010), http://www.plannedparenthood.org/about-us/newsroom/press-releases/statement-cecile-richards-president-ppfa-house-passing-historic-health-care-reform-bill-32230.htm.

[13] Thomas Peters, *White House Knew Obamacare Abortion Funding "Ban" a Sham*, Lifenews.com (Nov. 15, 2011) (linking to Email of Larry Tribe (March 21, 2010), obtained by Judicial Watch, *available at* http://www.judicialwatch.org/files/documents/2011/doj-kagan-docs-11102011.pdf).

It is the constitutional duty of the President and the Executive Branch to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cls. 4. The legislative authority, however, is reserved to Congress and the Legislative Branch. *See id.* art. I. Correspondingly, in his actions to enforce the law, such as issuing an Executive Order, the President may not amend or otherwise contradict the legislative mandates expressed by Congress in the form of statutory law. *See Minnesota v. Mille Lacs Band Chippewa Indians*, 526 U.S. 172, 188-89 (1999). *See also The Confiscation Cases*, 87 U.S. 92, 112-13 (1873) ("No power was ever vested in the President to repeal an act of Congress.").[14] Finally, of course, it is the Judicial Branch, not the Executive Branch, that has the final word on what the law means. *See* U.S. CONST. art. III; *Marbury v. Madison*, 5 U.S. 137, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

In light of these principles, the USCCB Memo provides the following four-part analysis:

> "First, the Executive Order says that '[t]he Act maintains current Hyde Amendment restrictions.' Executive Order, § 1. If 'maintains' means simply that PPACA does not repeal the annual Hyde

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[14] That the President has subsequently seen fit unilaterally to disregard portions of the ACA does not mean those actions are lawful or proper exercises of executive power. *See, e.g.*, Ed. Board, *The Obama administration has a mandate on the health-care law, too*, The Washington Post (Feb. 11, 2014) ("But none of that excuses President Obama's increasingly cavalier approach to picking and choosing how to enforce this law."), http://www.washingtonpost.com/opinions/the-obama-administration-has-a-mandate-on-the-health-care-law-too/2014/02/11/f001df36-9361-11e3-84e1-27626c5ef5fb_story.html.

Amendment that covers most HHS appropriations, then the statement is true but obvious and irrelevant under PPACA. But if 'maintains' means that PPACA includes the Hyde restrictions and applies them to its own appropriations for CHCs, then the statement is false, except in the two specified areas described above. Therefore, PPACA appropriations for CHCs are still not subject to a Hyde restriction and must be used to pay for abortions. This is no fix."

"Second, the Executive Order says that '[e]xisting law prohibits these [community health] centers from using Federal funds to provide abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), as a result of both the Hyde Amendment and longstanding regulations containing the Hyde language.' Executive Order, § 3. But once again, the *annual* Hyde Amendment does not cover PPACA appropriations for CHCs, and the HHS regulations are based exclusively on that inapplicable Amendment. So although annual appropriations for CHCs are restricted by Hyde in the way described in the order, PPACA appropriations for CHCs are not. Therefore, to the extent the Executive Order suggests that existing law would subject PPACA funds to annual Hyde restrictions, it is inaccurate. And any enforcement based on that inaccurate account of the law would be invalidated in court."

"Third, the Executive Order states that PPACA 'specifically prohibits the use of tax credits and cost-sharing reduction payments to pay for abortion services (except in cases of rape or incest, or when the life of the woman would be

endangered) in the health insurance exchanges....' Executive Order, § 2. This is an accurate description of the Act as far as it goes, *see* PPACA, § 1303(b)(2), but adds nothing to the enforcement of this limitation. Moreover, PPACA does *not* prohibit the federal funding of abortion anywhere else among its own appropriations, with the exception of school-based health centers. PPACA § 4101. Nor does the Act prohibit—indeed, it explicitly permits—tax-credits and cost-sharing reduction payments to be made for *insurance policies* that include abortion, in violation of the second principle of the Hyde Amendment. PPACA, § 1303(a)(2). And the Executive Order does nothing to fix these shortcomings of the statute—nor could it, for if it did, it would involve an intrusion of the Executive Branch into the legislative power."

"Fourth and finally, the Order states that PPACA 'imposes strict payment and accounting requirements to ensure that Federal funds are not used for abortion services....' Executive Order, § 2. Again, this does correspond with the language of the statute. PPACA, § 1303(b)(2). But those statutory requirements were added to the Act in lieu of a flat ban on the use of federal funds to pay for *insurance policies* that include abortion. Accordingly, this provision of the Executive Order is legally valid, but it reinforces a provision that falls short of the second Hyde principle."

USCCB Memo of March 25, 2010, supra n. 5, at 6.

B. The ACA Authorizes Taxpayer Funded Abortion in Federal Programs.

1. Taxpayer Funded Abortion in High Risk Pools

An early and graphic demonstration that the statutory language of the ACA does indeed authorize taxpayer funding of abortion is a pertinent component of the ACA that has already been implemented. Specifically, that provision is Section 1101 of the ACA, 42 U.S.C. § 18001, creating the Pre-Existing Condition Insurance Plan (PCIP), also known as the "high-risk pool" program.

As detailed in paragraphs 35-44 of the Johnson Affidavit, supra, n.3, this program is completely federally funded by the ACA. It directly authorizes $5 billion in federal taxpayer funds for this program alone, which (before the January 1, 2014 effective date of the ACA) provided coverage for high-risk uninsured people who were unable to secure coverage from private carriers. As explained above, the ACA contains no restriction on the use of these funds for abortion.

Since Section 1101 mandated launching the PCIP program within 90 days of enactment of the law, the federal Department of Health and Human Services invited states that wished to operate the program in their respective states to submit proposals by June 1, 2010. During July, 2010, National Right to Life Committee (NRLC) examined those state-submitted proposals and found that three states had submitted and apparently received HHS approval for plans that covered elective abortion (Pennsylvania, New Mexico, and Maryland). Johnson Affidavit at ¶ 25, JA 87-88.

In a report published on July 22, 2010 FactCheck.org, a nonpartisan entity operated by the Annenberg Public Policy Center, examined NRLC's July 13, 2010 press release regarding the HHS-approved PCIP proposal for Pennsylvania and concluded that it did indeed cover elective abortion. *Taxpayer Funded Abortions in High Risk Pools*, http://www.factcheck.org/2010/07/ taxpayer-funded-abortions-in-high-risk-pools/.

FactCheck.org also verified that the State of New Mexico explicitly listed "elective termination of pregnancy" as covered under the federal PCIP in that state, in a document provided on a state website to prospective enrollees. *Id.*

On July 23, 2010, the Congressional Research Service (CRS), a nonpartisan research support agency for Congress, issued a report confirming that neither the Hyde Amendment nor any provision of the ACA prevented the use of funds in the PCIP program from being used to cover all elective abortions. The CRS report also correctly noted that Executive Order 13535 was entirely silent on the PCIP component of the PPACA. Congressional Research Service, *High Risk Pools under PPACA and the Coverage of Elective Abortion Services* (July 23, 2010), http://www.help.senate.gov/imo/media/doc/CRS%20Report%20for%20HELP%2007232010.pdf

On July 29, 2010, under mounting public attention, the federal Department of Health and Human Services issued a regulation specifying that it will not allow coverage of abortions under the PCIP in any state, except to save the life of the mother, or in cases of rape or incest. 75 Fed. Reg. 45014 (2010). Notably, HHS did not assert that this decision was legally dictated by any provision of the ACA or by Executive

Order 13535, but implicitly recognized that this was not the case, by observing that similar restrictions were in force in "certain federal programs that are similar to the PCIP program."

On the same day the regulation was issued, the head of the White House Office of Health Reform issued a statement on the White House blog explaining that the discretionary decision to exclude abortion from the PCIP "is not a precedent for other programs or policies [under the ACA] given the unique, temporary nature of the program."[15] The director of the Washington legislative office of the American Civil Liberties Union urged protest of that decision before it was finalized, stating, "The White House has decided to *voluntarily* impose the ban for all women in the newly-created high risk insurance pools.... What is disappointing is that there is *nothing in the law* that requires the Obama Administration to impose this broad and highly restrictive abortion ban."[16]

The series of events surrounding the implementation of the PCIP provides a concrete demonstration that the statutory language of the ACA does authorize taxpayer funding of abortion; and that such funding is not precluded by the Hyde Amendment by any provision of the ACA or of Executive Order 13535. In response to public education, "DHHS ultimately drew

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[15] Nancy-Ann DeParle, *Insurance for Americans with Pre-Existing Conditions*, The White House Blog (July 29, 2010), http://www.whitehouse.gov/blog/2010/07/29/insurance-americans-with-pre-existing-conditions.

[16] Julian Pecquet, *ACLU steps into healthcare reform fray over abortion*, The Hill (July 17, 2010) (emphasis added), http://thehill.com/blogs/healthwatch/health-reform-implementation/109383-aclu-steps-into-healthcare-reform-fray-over-abortion.

on the discretionary administrative authority that the bill conferred specifically with respect to the PCIP program to shut off abortion funding in the PCIP—even as the senior White House health policy aide underscored that this would not be a precedent for implementation of other components of the PPACA." Johnson Affidavit, supra, n. 3, at ¶ 44, JA 94-95.

2. Taxpayer Funded Abortion Allowed in Community Health Center Fund

The ACA established the "Community Health Center Fund" and directly appropriated "$11 billion over a five year period for the operation, expansion and construction of health centers throughout the Nation."[17] Community Health Centers ("CHCs") provide primary health services, including "health services related to family medicine, internal medicine, ... obstetrics, or gynecology that are furnished by physicians," and "family planning services." ACA § 10503, codified at 42 U.S.C. § 254b. Thus, the statutory terms that describe the services provided by the CHC program are as broad as the terms used in the Medicaid statute, and in the case of "family planning services," the terms are identical. Therefore, by virtue of the same reasoning applicable to the Medicaid statute, *supra* Section A(1), courts are highly likely to conclude that the CHC program *must* provide tax-funded abortions unless Congress attaches to the CHC funds a Hyde-type limitation. And because the ACA appropriates CHC funds without including a Hyde-type limitation in that appropriation, those

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[17] U.S. Dept. of Health and Human Services, *The Affordable Care Act and Health Centers*, http://bphc.hrsa.gov/about/healthcenterfactsheet.pdf.

funds, under the court precedent referenced above, *must* be used for abortions.

CHCs have existed for more than 45 years, and so far they have not provided abortions except in the narrow range of cases where Hyde has authorized them (rape, incest, and threat to maternal life). But that is precisely because all of their federal funding, at least so far, appears to have been made through annual appropriations bills that included the Hyde Amendment. The problem with the ACA is that it makes a *separate* appropriation of billions of dollars for CHCs *without* including Hyde Amendment language to cover that appropriation.[18]

The Secretary of HHS wrote recently that HHS regulations exclude federal funding of abortions in CHCs, subject to life-of-the-mother, rape, and incest exceptions. We agree that the HHS regulations she cites are perfectly valid as to funds that Congress

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[18] The Hyde Amendment limits abortion using "funds appropriated in this Act," and also applies to "funds in any trust fund to which funds are appropriated in this Act." Consolidated Appropriations Act, 2010, Div. D, tit. V, § 507. Based on the latter, some may argue that the ACA appropriations may not be used for abortions in CHCs if they are commingled in a trust fund that is already Hyde-restricted. But the ACA does not place CHC funds into such an existing trust fund. Rather, the ACA creates a new fund into which its new appropriations shall be placed. ACA, § 10503 ("It is the purpose of this section to establish a Community Health Center Fund (referred to in this section as the 'CHC fund') ... There is authorized to be appropriated, and there is appropriated, out of any monies in the Treasury not otherwise appropriated, to the CHC Fund" specified amounts to be used for CHCs). *See also* Executive Order, § 3 (noting that the ACA creates new CHC fund within HHS). Thus, the ACA-appropriated funds are untouched by any existing Hyde limitation on the fund into which they are appropriated, and must under the cases described earlier still be spent on abortions.

appropriated specifically subject to the annual Hyde restriction. But those regulations rely for their statutory authority—and their validity—on the annual Hyde Amendment. Because that annual Hyde Amendment does not apply to ACA appropriations for CHCs, and because that section of ACA does not have Hyde language of its own, the regulations are highly likely to be found unenforceable as to these ACA-appropriated funds.

Indeed, the fact that the HHS regulations currently call for abortions to be provided in the CHC program in cases when the mother's life is endangered (42 C.F.R. § 50.304), and in cases of rape or incest (42 C.F.R. § 50.306), is an implicit acknowledgment that abortions are generally within the range of services that CHCs provide, subject only to such limitations as Congress has imposed through the Hyde Amendment. The problem is that the ACA makes an appropriation to the CHC program *without* an accompanying Hyde Amendment, thereby depriving the regulations of any statutory basis as applied to the funds that the ACA appropriates for CHCs.

In sum, the combination of (a) the statutory mandate that CHCs currently have to provide comprehensive health services, and (b) the absence of any Hyde limitation on the funds that the ACA appropriates for CHCs, means that (c) courts are highly likely to read the ACA to require the funding of abortions at CHCs in the absence of a statutory correction.

C. The ACA Authorizes Taxpayer Subsidies for Exchange Plans that Cover Elective Abortion

The following section addresses the impact of the "Nelson-Boxer Amendment," discussed above, which adopted Section 1303 of the ACA. In short, the accounting scheme embodied in the express language of Section 1303 of the ACA is contrary to the second part of the Hyde Amendment, which provides that no federal funds can be used to pay for health insurance coverage that includes elective abortions. This is because the statutory language in the ACA expressly states that federally subsidized plans in the Exchanges may include coverage for elective abortion. The statute further requires that all enrollees who find themselves in such plans (often unintentionally by virtue of the "secrecy language" discussed below) must, without exception, pay an abortion premium surcharge to be placed into a separate abortion allocation account.

Notably, while Section 1303 was written to implement a "two check" scheme to avoid the appearance of federal subsidies covering abortion, new research indicates that the "separate payments" requirement expressly required by Section 1303 is not being enforced by the Obama Administration.[19]

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[19] Susan T. Muskett, *Bait-and-Switch: The Obama Administration's Flouting a Key Part of Nelson 'Deal' on Obamacare*, National Right to Life News (Dec. 9, 2013) (quoting bulletins and guidance from state insurance commissioners in Maryland, New York and Washington State advising insurance companies that the state will not require them to collect the separate payments from enrollees, nor to even issue an itemized bill setting forth the separate abortion surcharge.)

1. The Abortion Premium Surcharge and its Secrecy Clause Force Taxpayers to Personally Fund the Abortions of Other Enrollees in Subsidized Plans

This section attempts to clear the fog surrounding the inner workings and unconstitutional impact of the Abortion Premium Mandate that originated in Section 1303 of the Affordable Care Act, as codified at 42 U.S.C. § 18023. Section 1303 of the ACA was subsequently implemented in regulations governing Exchanges that were finalized on March 27, 2012, entitled "Segregation of funds for abortion services." Section 1303 and its implementing regulations are collectively referred to as "Section 1303" or the "Abortion Premium Mandate".

The accounting scheme laid out in the provisions of Section 1303 was devised as an attempt to overcome the political hurdle of "taxpayer subsidized abortion."[20] This became necessary because the ACA expressly allowed health plans to provide elective abortion coverage within the government subsidized Exchanges, contrary to the Hyde Amendment and former federal policy.[21]

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[20] Of course, if individuals are forced to pay for other people's elective abortions, this too is a form of "taxpayer funded abortion."

[21] The ACA breaks with the consistent federal policy since 1996 of prohibiting coverage for elective abortion in subsidized plans offered through the Federal Employees Health Benefits Plan, military insurance through TRICARE, or Indian Health Services. Ernest Istook, *The Real Status Quo on Abortion and Federal Insurance*, The Heritage Foundation (November 11, 2009), http://blog.heritage.org/2009/11/11/the-real-status-quo-on-abortion-and-federal-insurance/.

a. How the Abortion Premium Mandate Operates.

On Christmas eve of 2009, following a week of tense negotiations with Senator Majority Leader Harry Reid, Senator Ben Nelson took to the floor of the U.S. Senate to explain the "manager's amendment" that he had negotiated. What would become Section 1303 of the Act was described by Senator Nelson as follows:

> [I]n the Senate bill [which later became the ACA], if you are receiving Federal assistance to buy insurance, and if that plan has any abortion coverage, the insurance company must bill you separately, and you must pay separately from your own personal funds—perhaps a credit card transaction, your separate personal check, or automatic withdrawal from your bank account—for that abortion coverage. Now, let me say that again. You have to write two checks: one for the basic policy and one for the additional coverage for abortion. The latter has to be entirely from personal funds.

In subsequent litigation brought by Liberty University based in part on the religious liberty implications of Section 1303, a federal district court explained:

Section 1303 became known as the "Nelson Compromise" because it arose out of an attempt by Senator Ben Nelson, a pro-life Democrat, to find language that would "make it clear that [the healthcare bill] does not fund abortion with government money." *Abortion Haggling Looms Over Health Care Debate in Senate* (Nov. 10, 2009), available at http://www.foxnews.com/politics/2009/11/10/abortion-haggling-looms-health-care-debate-senate/ (last visited March 5, 2013).

> In plans that do provide non-excepted [elective] abortion[22] coverage, a separate payment for non-excepted [elective] abortion services must be made by the policyholder to the insurer, and the insurer must deposit those payments in a separate allocation account that consists solely of those payments; the insurer must use only the amounts in that account to pay for non-excepted [elective] abortion services. ACA, § 1303(b)(2)(B),(C). Insurers are prohibited from using funds attributable to premium tax credits or [federal] cost-sharing reductions ... to pay for non-excepted [elective] abortion services. ACA § 1303(b)(2)(A).

Liberty University v. Geithner, 753 F. Supp. 2d 611, 643 (W.D. Va. 2010).

With the finalization of the implementing regulations that mirror Section 1303, each enrollee in Exchange plans that happen to include abortion coverage is mandated to make "a separate payment" from their own personal funds or payroll deduction directly into an allocation account to be "used exclusively to pay for" other people's elective surgical abortions. 45 CFR § 156.280(e) (implementing ACA, Section 1303(b)(2)(B), as codified at 42 U.S.C. § 18023). This abortion premium mandate applies "without regard to the enrollee's age, sex, or family status," 45 CFR § 156.280(e)(2)(i), and with no exemption for enrollees who consider the practice and

---

[22] The court used the ACA phrase "non-excepted" to describe elective abortions (all abortions other than those in cases of rape, incest or life of the mother). ACA, §1303(b)(1)(B).

direct funding of surgical abortion to be a grave moral evil.

Futhermore, despite the clear language of the ACA, it appears that the "separate payments" requirement is not going to be enforced by the Obama Administration. Gretchen Borchelt, director of state reproductive health policy at the National Women's Law Center, told the Huffington Post that "we used to talk about it as being two checks that the consumer would have to write because of the segregation requirements, but that's not the way it's being implemented."[23] Likewise, a spokeswoman for Rhode Island's Exchange told PolitiFact Rhode Island that "the customer is not billed a separate fee." As PolitiFact notes, "it turns out to be a hidden fee."[24]

b. How the "Secrecy Clause" Creates Abortion Landmines for Taxpayers

Since the ACA's effective date of January 1, 2014, pro-life Americans shopping in the Exchanges have been unable to get a straight answer on which plans include elective abortion.[25] As time goes on, taxpayers

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[23] Jeffrey Young, *Obamacare Provokes 21 States Into Banning Abortion Coverage by Private Health Insurers*, Huffington Post (Sept. 3, 2013), http://www.huffingtonpost.com/2013/09/03/obamacare-abortion-coverage_n_3839720.html.

[24] PolitiFact Rhode Island (Oct. 2, 2013), http://www.politifact.com/rhode-island/statements/2013/oct/23/barth-bracy/anti-abortion-activist-barth-bracy-says-people-who/. For other examples of State insurance commissions who are not being required by the Obama administration to abide by the "separate payments" requirement of Section 1303, *see* Susan T. Muskett, *Bait-and-Switch: The Obama Administration's Flouting a Key Part of Nelson 'Deal' on Obamacare*, *supra* n. 20.

[25] Julie Rovner, *Which Plans Cover Abortion? No Answers on HealthCare.gov*, NPR (Nov. 1, 2013), http://www.npr.org/

will increasingly find themselves subject to the Abortion Premium Mandate because either (1) the abortion inclusive plan was the choice of their small employer who purchased a subsidized group plan in the Exchange,[26] or (2) they become entrapped via the "secrecy clause" that effectively instructs insurers to conceal abortion coverage and abortion premiums when advertising in the Exchanges (and even to conceal the breakout of the separate abortion premium in the summary of benefits provided at enrollment). 45 CFR § 156.280(f).[27]

Given the profound religious freedom issues that arise from the ACA's inclusion of plans that cover elective surgical abortion, as well as its clear violation of the second part of the Hyde Amendment by subsidizing abortion plans, the burden should be on the government to clearly warn consumers who respect the sanctity of human life to avoid abortion-covering Exchange plans. But, quite to the contrary, the ACA and its implementing regulations effectively

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blogs/health/2013/11/01/242174176/which-plans-cover-abortion-no-answers-on-healthcare-gov. *See also* Genevieve Plaster and Charles A. Donavan, *Elective Abortion Coverage Information Still Elusive*, Charlotte Lozier Institute (Dec. 13, 2013) (reporting on a survey sample of online websites via the federal exchange examined by the authors, and detailing the difficulty if not impossibility of identifying which plans cover elective abortion).

[26] Small Business Health Care Tax Credit for Small Employers, Internal Revenue Service, http://www.irs.gov/uac/Small-Business-Health-Care-Tax-Credit-for-Small-Employers.

[27] For a two-page review of the regulations' abortion mandate and secrecy clause, *see* USCCB, *Backgrounder: The New Federal Regulation on Coerced Abortion Payments*, http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Backgrounder-The-New-Federal-Regulation-on-Coerced-Abortion-Payments.pdf .

instruct the issuers to conceal elective abortion coverage and the separate abortion premium from taxpayers in the federally subsidized Exchanges.

Section (f)(1) of 45 CFR § 156.280 provides that notice about a plan's inclusion of elective abortion coverage is to be disclosed *not* in Exchange advertising, but rather "*only*... at the time of enrollment." Further, section (f)(2) prohibits issuers from disclosing the separate elective abortion premium in Exchange advertisements, and even in the summary of benefits provided at enrollment. Rather, it requires that the issuer must provide notice "only with respect to *the total amount of the combined payments*" of regular premiums and the abortion premium.

The "secrecy clause" reads as follows:

> (f) *Rules relating to notice.*
>
> (1) *Notice.* A QHP [qualified health plan] that provides for coverage of services in paragraph (d)(1) of this section [elective abortion], must provide a notice to enrollees, *only* as part of the summary of benefits and coverage explanation, *at the time of enrollment*, of such coverage.
>
> (2) *Rules relating to payments.* The notice described in subparagraph (f)(1) of this section, any advertising used by the QHP issuer with respect to the QHP, any information provided by the Exchange, and any other information specified by HHS must provide information *only with respect to the total amount of the combined payments* for services described in paragraph (d)(1) of this

> section [elective abortion] and other services covered by the QHP.

45 C.F.R. § 156.280(f), 77 Fed. Reg 18472-73 (emphasis added).

From a pro-life perspective, even if the Section 1303 requirement of two payments were being effectuated, it would not mitigate the fact that massive federal premium subsidies are now flowing to Exchange plans that cover elective abortion (a sharp departure from the longstanding policy of the Hyde Amendment), and that every taxpayer enrolled in the plan will have a portion of their premium placed into a separate account solely to pay for other people's elective abortions. But it is telling that part of the very "deal" that secured passage of the ACA—that separate payments be collected from enrollees in abortion-covering Exchange plans—is now being flagrantly flouted. *See* Susan T. Muskett, *Bait-and-Switch: The Obama Administration's Flouting a Key Part of Nelson 'Deal' on Obamacare*, *supra* n. 20.

2. The ACA Subsidizes Plans Required by the HHS Mandate to Cover Abortion-Inducing Drugs and Devices

Enrollees who somehow navigate the murky waters of the taxpayer subsidized Exchanges to find a plan that does not include surgical abortion coverage will nonetheless be subjected to the HHS "Women's Preventive Services" Mandate covering abortifacient drugs and devices, without the ability to decline coverage.

To be sure, ACA § 1334(a)(6) requires at least one qualified health plan in each Exchange that does not cover surgical elective abortion. But this option does

not provide relief from the HHS Mandate that requires certain abortion-inducing drugs and devices to be included in every single qualified health plan, even those that are subsidized by taxpayer dollars.

While most of the public attention on the HHS Mandate has focused on employer group plans and plans by non-exempt religious organizations, the HHS Mandate is also applicable to every single *individual* health insurance plan, including those subsidized by taxpayer dollars in the Exchanges:

> [N]on-grandfathered group health plans and *health insurance issuers offering* group *or individual health insurance coverage* [shall] provide benefits for certain preventive health services without imposition of cost sharing... that include... '[a]ll FDA approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity....

77 Fed. Reg. 8725 (emphasis added) (implementing 42 U.S.C. § 300gg-13(a)).

As discussed in briefing before this Court in the Hobby Lobby/ Conestoga Woods cases, Nos. 13-354, 13-356, FDA-approved "contraceptives" include drugs and devices that are capable of terminating the life of a human being at the embryonic stage of development. The mandatory inclusion of these life-ending drugs and devices as an "essential benefit" is one more example of an administrative decree under the ACA that allows and even requires abortion funding.

For the above reasons, the ACA authorizes taxpayer-funded abortion.

CONCLUSION

Amicus respectfully urges this Court to reverse the decision below.

Respectfully submitted,

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
Counsel of Record
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, AZ 85254
(504) 231-7234
dbordlee@bdfund.org

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

SUSAN B. ANTHONY LIST, ET AL.,
Petitioners,

v.

STEVEN DRIEHAUS, ET AL.,
Respondents.

On a Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND P.J. O'ROURKE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-2000
ishapiro@cato.org

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QUESTION PRESENTED

Can a state government criminalize political statements that are less than 100% truthful?

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INTEREST OF *AMICI CURIAE*[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

P.J. O'Rourke is America's leading political satirist and an H.L. Mencken Research Fellow at the Cato Institute. Formerly the editor of the *National Lampoon*, he has written for such publications as *Car and Driver*, *Playboy*, *Esquire*, *Vanity Fair*, *House & Garden*, *The New Republic*, *The New York Times Book Review*, *Parade*, *Harper's*, and *Rolling Stone*. He is now a contributing editor at *The Atlantic* and *The Weekly Standard*, a member of the editorial board of *World Affairs*, and a regular panelist on NPR's *Wait, Wait . . . Don't Tell Me*. O'Rourke's books have been translated into a dozen languages and are worldwide bestsellers. Three have been *New York Times* bestsellers: *Parliament of Whores*, *Give War a Chance*, and *All the Trouble in the World*. He is also

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* made a monetary contribution its preparation or submission. Also, *amici* and their counsel, family members, and pets have all won the Congressional Medal of Honor.

the author of *Eat the Rich*, *Peace Kills*, and *Don't Vote: It Just Encourages the Bastards*.

This case concerns *amici* because the law at issue undermines the First Amendment's protection of the serious business of making politics funny.

INTRODUCTION AND SUMMARY OF ARGUMENT

"I am not a crook."

"Read my lips: no new taxes!"

"I did not have sexual relations with that woman."

"Mission accomplished."

"If you like your healthcare plan, you can keep it."

While George Washington may have been incapable of telling a lie,[2] his successors have not had the same integrity. The campaign promise (and its subsequent violation), as well as disparaging statements about one's opponent (whether true, mostly true, mostly not true, or entirely fantastic), are cornerstones of American democracy. Indeed, mocking and satire are as old as America, and if this Court doesn't believe *amici*, it can ask Thomas Jefferson, "the son of a half-breed squaw, sired by a Virginia mulatto father."[3] Or perhaps it should

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[2] Apocryphal.

[3] Monticello.org, *Son of a Halfbreed Indian Squaw (Quotation)*, http://www.monticello.org/site/son-half-breed-indian-squaw-quotation (last visited Feb. 28, 2014).

ponder, as Grover Cleveland was forced to, "Ma, ma, where's my pa?"[4]

In modern times, "truthiness"—a "truth" asserted "from the gut" or because it "feels right," without regard to evidence or logic[5]—is also a key part of political discourse. It is difficult to imagine life without it, and our political discourse is weakened by Orwellian laws that try to prohibit it.

After all, where would we be without the knowledge that Democrats are pinko-communist flag-burners who want to tax churches and use the money to fund abortions so they can use the fetal stem cells to create pot-smoking lesbian ATF agents who will steal all the guns and invite the UN to take over America? Voters have to decide whether we'd be better off electing Republicans, those hateful, assault-weapon-wielding maniacs who believe that George Washington and Jesus Christ incorporated the nation after a Gettysburg reenactment and that the only thing wrong with the death penalty is that it isn't administered quickly enough to secular-humanist professors of Chicano studies.

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[4] Answer: "Gone to the White House, ha ha ha!" Elisabeth Donnelly, *Ye Olde Sex Scandals: Grover Cleveland's Love Child*, The Awl, http://www.theawl.com/2010/02/ye-olde-sex-scandals-grover-clevelands-love-child.

[5] Wikipedia.com, *Truthiness*, http://en.wikipedia.org/wiki/Truthiness (last visited Feb. 28, 2014) (describing the term's coinage by Stephen Colbert during the pilot of his show in October 2005). *See also* Dictionary.com, *Truthiness*, http://dictionary.reference.com/browse/truthiness (last visited Feb. 28, 2014).

Everybody knows that the economy is better off under [Republican/Democratic] [6] presidents—who control it directly with big levers in the Oval Office—and that:

> President Obama is a Muslim.
>
> President Obama is a Communist.
>
> President Obama was born in Kenya.
>
> Nearly half of Americans pay no taxes.[7]
>
> One percent of Americans control 99 percent of the world's wealth.
>
> Obamacare will create death panels.
>
> Republicans oppose immigration reform because they're racists.
>
> The Supreme Court is a purely political body that is evangelically [liberal/conservative].[8]

All of the above statements could be considered "truthy," yet all contribute to our political discourse.

Laws like Ohio's here, which criminalize "false" speech, do not replace truthiness, satire, and snark with high-minded ideas and "just the facts." Instead, they chill speech such that spin becomes silence. More importantly, Ohio's ban of lies and damn lies[9] is inconsistent with the First Amendment.

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[6] Circle as appropriate.

[7] 47 percent to be exact, though it may be higher by now.

[8] Again, pick your truth.

[9] *Amici* are unsure how much torture statistics can withstand before they too run afoul of the law.

This Court has repeatedly held that political speech, including and especially speech about politicians, merits the highest level of protection. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office."). Indeed, quite recently this Court held that the First Amendment protects outright lies with as much force as the truth. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

It is thus axiomatic—not merely truthy—that speech may only be restricted or regulated where doing so is necessary to further a compelling state interest. But the government has no compelling interest in eliminating truthiness from electioneering and, even if such an interest existed, such laws are unnecessary because any injury that candidates suffer from false statements is best redressed by pundits and satirists—and if necessary, civil defamation suits. Nor is the government well-suited for evaluating when a statement crosses the line into falsehood.[10]

Ohio's law blatantly violates the First Amendment and directly conflicts with *Alvarez*. This Court should terminate it with extreme prejudice.

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[10] Two Pinocchios out of five is OK, but three is illegal?

ARGUMENT

I. TRUTHINESS, INSINUATIONS, AND ALLEGATIONS ARE A VITAL PART OF POLITICAL SPEECH

In the hotly contested election of 1828, supporters of John Quincy Adams called Andrew Jackson a "slave-trading, gambling, brawling murderer." Mac McClelland, *Ten Most Awesome Presidential Mudslinging Moves Ever*, Mother Jones, (October 31, 2008).[11] Jackson's supporters responded by accusing Adams of having premarital sex with his wife and playing the role of a pimp in securing a prostitute for Czar Alexander I. *Id.*

During Thomas Jefferson's presidency, James T. Callender, a pamphleteer and "scandalmonger," alleged that Jefferson had fathered numerous children with his slave Sally Hemings.[12] Callender's allegations would feature prominently in the election of 1804, but it wasn't until nearly two centuries later that the allegations were substantially confirmed.[13]

More recently, we've had discussions of draft-dodging, Swift Boats, and lying about birthplaces[14]—

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[11] Available at http://www.motherjones.com/mojo/2008/10/ten-most-awesome-presidential-mudslinging-moves-ever.

[12] Monticello.org, *James Callender*, http://www.monticello.org/site/research-and-collections/james-callender.

[13] Monticello.org, *Thomas Jefferson and Sally Hemings: A Brief Account*, http://www.monticello.org/site/plantation-and-slavery/thomas-jefferson-and-sally-hemings-brief-account.

[14] While President Obama isn't from Kenya, he is a Keynesian—so you can see where the confusion arises.

not to mention the assorted infidelities that are a political staple. Any one of these allegations, if made during an Ohio election, could be enough to allow a complaint to be filed with the Ohio Election Commission (OEC) and thus turn commonplace political jibber-jabber into a protracted legal dispute.

When political barbs become legal disputes, the public is denied an important part of political speech, namely, responses to those allegations. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927). Inflammatory, insulting, and satirical speech is more likely to produce a response, thus making the back-and-forth of politics a self-correcting marketplace of ideas—except, of course, when candidates can tattle to the government, which then takes away their ~~toys~~ speech.

This case began when Rep. Steven Driehaus responded to an advocacy group's political attack[15] by filing a complaint with the OEC. Cert. Pet. at 2. Resources that could have been spent responding to the petitioner's truthiness were thus redirected to a bizarre legal fight. And this caused a ripple effect: The Coalition Opposed to Additional Spending and Taxes felt sufficiently chilled by Driehaus's actions to refrain from engaging in the campaign at all. *Id.* at

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[15] Driehaus voted for Obamacare, which the Susan B. Anthony List said was the equivalent of voting for taxpayer-funded abortion. *Amici* are unsure how true the allegation is given that the healthcare law seems to change daily, but it certainly isn't as truthy as calling a mandate a tax.

4. Ohio's law thus ultimately weakened the vibrancy of the state's political discourse.

Supporters of Ohio's law believe that it will somehow stop the lies, insults, and truthiness, raising the level of discourse to that of an Oxford Union debate.[16] Not only does this Pollyannaish hope stand in the face of all political history, it disregards the fact that, in politics, truths are *felt* as much as they are *known*. When a red-meat Republican hears "Obama is a socialist," or a bleeding-heart Democrat hears, "Romney wants to throw old women out in the street," he is feeling a truth more than thinking one. No government agency can change this fact, and any attempt to do so will stifle important political speech.

II. THIS COURT HAS ALREADY HELD THAT TRUTHINESS, INSINUATIONS, AND ALLEGATIONS ARE PROTECTED BY THE FIRST AMENDMENT

1. Many campaign statements cannot easily be categorized as simply "true" or "false." According to Politifact.com, President Obama's claim that "if you like your health-care plan you can keep it" was true five years before it was named the "Lie of the Year."[17]

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[16] *Amici*'s counsel has been to an Oxford Union debate; the level of discourse is not always that high.

[17] Compare Politifact.com, *Obama's Plan Expands Existing System*, Oct. 9, 2008, http://www.politifact.com/truth-o-meter/statements/2008/oct/09/barack-obama/obamas-plan-expands-existing-system, with Politifact.com, *Lie of the Year: 'If you like your health care plan, you can keep it,'* Dec. 12, 2013, http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it.

More importantly, even if such a categorization *could* be made, false (and truthy) speech is protected by the First Amendment, especially if it's political.

In *United States v. Alvarez*, this Court held that there is no "general exception to the First Amendment for false statements." 132 S. Ct. at 2544. In that case, the speech was entirely false, and there was no reasonable way to interpret it as truthful. Yet if *Alvarez* confirmed that the First Amendment protects even blatant lies made in the process of campaigning for office, surely it protects spin, parody, and truthiness.

In declaring unconstitutional an equivalent ban on false campaign speech, the Washington Supreme Court held that the government's claimed interest in prohibiting false statements of fact was invalid, in part because it "presupposes the State possesses an independent right to determine truth and falsity in political debate, a proposition fundamentally at odds with the principles embodied in the First Amendment. Moreover, it naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech." *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826, 849-850 (Wa. 2007).

This Court has held that as "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798." *N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964). By the same logic, false and defamatory statements about politicians' backgrounds—including their

voting records—are also constitutionally protected. Statements that are merely false, and not inherently defamatory, must therefore also be protected.

Ohio's law explicitly prohibits not merely *defamatory* falsehoods, but *all of them*—including the sort of self-promoting lies that this Court held to be constitutionally protected in *Alvarez*. And not only does it make no distinction between defamatory and non-defamatory statements, but the petitioners' allegation could not have been inherently defamatory given that more than 78 percent of Americans favor legal abortion in at least some cases.[18]

2. This case began with a claim—"Steve Driehaus voted to fund abortions"—that certainly could have caused consternation if uttered at a bar or dinner party. Surreally, it ended up before the U.S. Supreme Court. Even worse, there is no question whether Driehaus voted for the bill at issue; the only dispute is whether that bill actually provides federal funding for abortions—which is a question of legal, economic, and even theological interpretation.

Statements of this kind—call them truthiness, spin, smear, or anything else—are as politically important as their factually pure counterparts. Democracy is based on the principle that the people elect representatives who reflect their beliefs and values, and whom they trust. Beliefs drive democracy—not some truth as adjudged by Platonic guardians—and there is no law that could make it

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[18] Gallup.com, *Abortion*, http://www.gallup.com/poll/1576/abortion.aspx (last visited Feb. 28, 2014) (latest poll, from May 2013: 26 percent favoring legal abortion always, 52 percent sometimes, 20 percent never).

otherwise. Those voters who believed that the Patient Protection and Affordable Care Act provides federal funding for abortion-on-demand (as many do) were told by the Susan B. Anthony List that one candidate had voted in favor of that law. The voters' *beliefs* were more important and relevant than the technical truths about the underlying legislation.

The Ohio law extends far beyond disputes over interpretation or implication. Its broad language also criminalizes rhetorical hyperbole and political satire. If, instead of a billboard reading "Driehaus voted for federally funded abortion," the petitioners had erected a billboard that said "Driehaus is a baby killer" the law would apply with equal effect. All the statute requires is: (1) that the statement be false; (2) that the speaker knew the statement was false, or spoke with reckless disregard for the truth; and (3) that the statement was made with the intent of impacting the outcome of the election. Ohio Rev. Code § 3517.21(B) It is thus apparently illegal in Ohio for an outraged member of the public to call a politician a Nazi or a Communist—or a Communist Nazi, for that matter. That is no exaggeration: the law criminalizes a misstatement made in "campaign materials," which includes "public speeches." *Id.*

And it is irrelevant that the law is limited to cases where the statements were made "knowingly" or with reckless disregard for the truth. It would not be a total defense to any charge under the law to simply state, "I honestly thought this was true." Instead, some fact-finder (whether the OEC, a judge, or a jury) will have to determine (1) whether the statement was false, and (2) whether the defendant knew it was false, or spoke recklessly.

The law also stifles, chills, and criminalizes political satire. For example, it is a crime in Ohio for a late-night talk-show host to say: "Candidate Smith is a drug-addled maniac who escaped from a mental institution." Even satirists and speakers that are clearly attempting primarily to entertain their audiences are subject to prosecution if they intend or expect their statements to impact how the audience perceives a candidate. A publication like *The Onion*—which regularly puts words in political figures' mouths, or makes up outlandish stories about them—could be violating Ohio law by making people think at the same time it makes them laugh.

3. This law is a paradigmatic example of a content-specific speech restriction that the First Amendment protects against. Why should a false or exaggerated statement about a politician attract government sanction, when that same statement made about another public figure would not?

In *Alvarez* this Court expressed its concern that upholding the Stolen Valor Act "would endorse government authority to compile a list of subjects about which false statements are punishable." 132 S. Ct. at 2547. Yet that is precisely what Ohio's legislature has done. While one subsection serves as a catch-all prohibition on all "false" statements made about a candidate, Ohio Rev. Code § 3517.21(B)(10), the majority of the section is devoted to a *specific* list of subjects about which false statements are punishable, including: a candidate's education (2), work history (3), criminal record (4-5), mental health (6), military service (7), and voting record (9).

But wait, there's more! Refraining from stating (arguable) falsehoods is not enough to stay clear of

violating the law. For example, the regulation of statements concerning a politician's criminal record requires speakers to actively take steps to avoid even the possibility of misinterpretation. If an Ohio political candidate has been indicted a dozen times on corruption and racketeering charges, you *cannot* lawfully say "Candidate Smith has been repeatedly indicted for corruption" without also saying how those indictments were resolved. Ohio Rev. Code § 3517.21(B)(5). Even if this Court were to reverse itself and hold that false statements are outside the scope of First Amendment protection, there is no question that truthful statements about candidates' criminal records are "at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

There is no reason why speech about these topics should be subject to regulation by the state, or why they should only be regulated for the benefit of politicians as opposed to other public figures—like actors, religious leaders, and famous athletes—who are often lied about. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (the First Amendment protects magazine accusing religious leader of a sexual relationship with his mother); *Beckham v. Bauer Publ'g Co.*, 2011 U.S. Dist. LEXIS 32269 (C.D. Cal. Mar. 17, 2011) (a newspaper asserting that famous soccer player had cheated on his wife with a prostitute was protected by both the First Amendment and anti-SLAPP statutes); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (protecting false statements about police officers' conduct). Nor are Ohio politicians so particularly thin-skinned that they require protection that politicians in other states do not. *See, e.g., Judge Dismisses Libel Suit*

Against Tenn. Senator, Associated Press, Apr. 26, 2013 (unreported case regarding allegations that a politician's opponent had been arrested on drug charges).[19] "Politics are politics, and it's a big boys' and big girls' game. That's just the way it is." *Id.* (judge's comments in dismissing the suit).

Those cases where the courts have allowed libel suits based on spurious statements about celebrities further demonstrate that the appropriate remedy when it comes to lies about public figures is, if anything, a civil suit. *See, e.g., Burnett v. Nat'l Enquirer*, 144 Cal. App. 3d 991 (Cal. Ct. App. 1983) (publisher can be held civilly liable for defamatory and false speech); *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249 (9th Cir. 1997) (fabrication of public figure's interview answers civilly actionable).

This Court has also limited the remedies states can provide to subjects of false speech. It would be incoherent if states were allowed to apply criminal sanctions—as Ohio attempts to do here—for conduct to which this Court has held the Constitution only permits the attachment of compensatory liability. *See Gertz v. Robert Welch*, 418 U.S. 323 (1974) (even when the subject of false statement is not a public official, liability for anything beyond actual damages can only be established by proof of actual malice).

While the mere fact that the courts have not recognized an exception to the First Amendment in the past does not mean that such an exception does not exist, this Court requires that those advocating

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[19] Available at http://www.firstamendmentcenter.org/judge-dismisses-libel-case-against-tenn-senator.

for such an exception show "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2734 (2011). In *Alvarez*, this Court held that the government had not proven a longstanding tradition of restricting false statements made by or about a political candidate. 132 S. Ct. at 2548. If the historical record provides evidence for any longstanding tradition in this regard, it is the venerable practice of politicians' lying about themselves and each other with complete impunity.

III. THE PUBLIC INTEREST IN POLITICAL HONESTY IS BEST SERVED BY PUNDITS AND SATIRISTS

This country has a long and estimable history of pundits and satirists, including *amici*, exposing the exaggerations and prevarications of political rhetoric. Even in the absence of the First Amendment, no government agency could do a better job policing political honesty than the myriad personalities and entities who expose charlatans, mock liars, lambaste arrogance, and unmask truthiness for a living.

Just two terms ago, this Court agreed wholeheartedly with that sentiment:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. *The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. See Whitney v. California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the

> falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. *And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse.* These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Alvarez, 132 S. Ct. at 2550 (emphases added).

As Chief Judge Kozinski argued when *Alvarez* was before the Ninth Circuit, a prohibition on lying devalues the truth: "How can you develop a reputation as a straight shooter if lying is not an option? Even if untruthful speech were not valuable for its own sake, its protection is clearly required to give breathing room to truthful self-expression, which is unequivocally protected by the First Amendment." *United States v. Alvarez*, 638 F.3d 666, 675 (9th Cir. 2011).

No one should be concerned that false political statements won't be subjected to careful examination. As this Court said in *Brown v. Harlage*,

"a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of 'more speech, not enforced silence,' thus has special force." 456 U.S. 45, 61 (1982). Recent technological advancements mean that statements by or about candidates will not just attract the attention of his or her opponents—instantly—but that of investigative journalists and professional fact checkers.

Politicians who are caught lying about themselves or others regularly attract more attention from the press than the subject of the original lie. The typical outcome is that the lie or cover up becomes more important than the original accusation or offense. And that dynamic predates smartphones and their latest "apps." The impeachment of President Clinton was not based on any sexual activities he might have engaged in with Monica Lewinsky, but over the attempt to cover it up. Similarly, President Nixon's resignation was prompted by his obfuscations rather than his orchestration of a third-rate burglary. And if this Court isn't yet convinced of this point, *amici* have but two words more on the subject: Anthony Weiner.

If Ohio's concern is that there are abundant lies being told in campaigns that escape media notice—and cannot be proven in a civil defamation suit—wouldn't that same lack of evidence hamstring prosecution under Ohio Rev. Code § 3517.21? Anyone who could fabricate enough evidence to mislead all of the fact-checkers and investigators who scrutinize his fables could surely evade a charge under this law.

Adding further penalties will not dissuade successful and talented liars. The only way that such a law could offer the public greater protection from untruthful speech—accepting for the sake of argument that such protection is lawful, desirable, and necessary—would be if it adopted lower standards of proof than those required by civil defamation suits or newspaper editors.

There is no lie that can be told about a politician that will not be more damaging to the liar once the truth is revealed. A crushing send-up on *The Daily Show* or *The Colbert Report* will do more to clean up political rhetoric than the Ohio Election Commission ever could.

CONCLUSION

Criminalizing political speech is no laughing matter, so this Court should reverse the court below.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave., NW
Washington, D.C. 2000
(202) 842-0200
ishapiro@cato.org

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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In the
Supreme Court of the United States

SUSAN B. ANTHONY LIST AND COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

ALLEN DICKERSON
Counsel of Record
ANNE MARIE MACKIN
TYLER MARTINEZ
ZAC MORGAN
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Ste. 201
Alexandria, VA 22314
adickerson@campaignfreedom.org
(703) 894-6800
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2005, the Center for Competitive Politics ("CCP") is a 501(c)(3) organization that seeks to educate the public about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through scholarly research and both state and federal litigation. *Amicus* has participated in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC,* 558 U.S. 310 (2010) and *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010).

SUMMARY OF ARGUMENT

There is more than one way to impose a First Amendment harm. Ohio's statute, which criminalizes false speech (as determined by the State), is one way. But even without such a determination, and the criminal sanctions that follow, an organization's speech can be effectively chilled through judicial process itself. Such is the case here: because one organization was hauled into court, forced to spend its energy and resources defending a meritless complaint, and had its reputation assailed with the imprimatur of a state

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[1] No party has contributed, monetarily or otherwise, to the preparation or filing of this brief, which was authored entirely by counsel for *amicus*. Pursuant to Rule 37 of this Court, all parties have filed blanket consents to the filing of *amicus* briefs in this case.

agency and a sitting member of Congress, it has (wisely) chosen not to speak in the future. And another organization, which watched this process from the sidelines, has decided to stay there.

Ohio's statute, in short, imposes predictable transaction costs on core political speech, or at least any political speech with which others may disagree.

The Sixth Circuit has done the same. By refusing to open its doors to pre-enforcement challenges, it has further increased the expense of public speech in Ohio, and consequently lowered the likelihood that individuals and groups will speak.

This Court has recognized that the manner in which lower courts conduct themselves, including how discovery practice impacts the cost of pre-enforcement litigation, may *itself* constitute a First Amendment injury. Such an injury is especially apparent where, as here, the burden imposed (costly legal fees) bears no relation to a cognizable governmental interest. For, as this Court determined only last Term, there is no sufficient governmental interest in preventing false political speech. Consequently, Ohio's enforcement regime, and the Sixth Circuit's deference thereto, imposes a fresh and independent First Amendment harm upon Petitioners, a harm that should be remedied by allowing them to immediately seek review of the offending state statute.

ARGUMENT

I. Even where Ohio's ban on false campaign speech does not result in criminal sanctions, the inevitable and costly need to defend oneself in an administrative proceeding itself works a First Amendment injury.

It is well-established that "'the First Amendment has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). And this Court has long recognized that "debate on the qualification of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Moreover, we refuse, in the United States, to suppress the right of the people "to praise or criticize governmental agents," lest we "muzzle[] one of the very [rights]...the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

This case asks whether such widely-cited and well-respected words reflect principles of law, enforceable before impartial courts.

Susan B. Anthony List ("SBA") criticized an incumbent politician for his vote in favor of the Affordable Care Act, characterizing that vote as a

use of the public fisc to fund abortion. Cert. Pet. at 2. While SBA's interpretation of the Affordable Care Act is just that—an interpretation—the fact that complex national policies are contestable is precisely why we have election campaigns. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies...the remedy to be applied is more speech, not enforced silence").

Not so in Ohio.

The incumbent in this case took issue with SBA's criticism. Ohio law allowed him to fire back by filing a formal complaint under the state's speech code. Cert. Pet. at 2. He even took steps to curtail SBA's preferred avenue of speech, threatening, under the same speech control measure at issue here, to sue an advertising company willing to rent billboard space to SBA. *Id.* at 3.

Filing the complaint may have been an easy task for the incumbent, but "SBA was forced to divert its time and resources...to hire legal counsel to defend itself before the OEC." *Id.* As a result, another speaker, Petitioner Coalition Opposed to Additional Spending and Taxes ("COAST"), self-silenced rather than subject itself to the same, predictable costs imposed upon SBA List by a sitting member of the Congress. *Id.* at 4.

And who can blame COAST? As a result of the complaint, SBA List was forced to defend itself at an hearing where partisan commissioners applied the

State's power to "determine[] and proclaim[] to the electorate the truth of various campaign allegations." Opp. to Cert. Pet. at 6 (internal quotation and citation omitted); Cert. Pet. at 2-4. Ultimately, a three-member panel of the Commission determined—notably, on a 2-1 vote—that SBA had likely intentionally lied about the incumbent's position. Cert. Pet. at 3-4. After successfully preventing an organization from speaking about his conduct in office, the incumbent lost the election, and, its purpose accomplished, quietly withdraw his complaint. *Id.*; Opp. to Cert. Pet. at 8.

Demonstrably, Ohio's challenged statute imposed real costs upon SBA List in 2010. These include the expense of legal representation, the time and attention of its officers, the distraction from its mission, and the reputational harm of the State of Ohio declaring it a likely liar. These costs have not changed SBA's mission and ideals—it still wishes to speak out in criticism of legislators who voted for the Affordable Care Act. But, given the harm done to it in 2010, SBA List will understandably refrain from speaking absent a guarantee that it will not again be subjected to these costs. Such an ongoing, obvious, and repeatable harm demands meaningful judicial review. This is especially true where, as here, the process itself has deterred a separate group from speaking at all.

Note that none of these costs includes the penalties Ohio's statute allows; each of them is a result of the process itself. And this Court has stated

that a State may not use "'procedural device[s]'" to "deter[]...speech which the Constitution makes free." *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) (Brennan, J. for the plurality) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Respondents claim that Petitioners may not obtain judicial review unless they suffer a future finding of probable cause by the full Ohio Elections Commission, indictment by a county prosecutor based on that finding, and conviction at trial. But even without such a final determination, the harm is already very real, the speech already silenced, and the prospect for future harassment apparent.

> **a. These burdens are exacerbated by the Sixth Circuit's refusal to review Ohio's system. That refusal works an independent First Amendment harm, and results in foreseeable and preventable chill to substantial political speech.**

Just seven years ago, this Court expressly noted that obstacles to judicial review of speech-suppressing laws can themselves "constitute[] a severe burden on political speech." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 n. 5 (2007) ("*WRTL II*"). There, a nonprofit corporation challenged a federal statute banning corporate speech. Although the case was decided on the merits, this Court noted in its controlling opinion that the lower court had imposed an unconstitutional burden by, *inter alia*, permitting extensive discovery and granting the government five depositions regarding the speaker's intent. *Id.* This imposition of onerous

procedural burdens before a putative speaker can obtain final judicial review of a ban on speech, in and of itself, *burdens speech*. Moreover, such impediments deter other speakers from engaging in public debate.[2]

The constitutional harm is not only the costs required to vindicate fundamental rights. It is also that those costs occur *to no purpose*. The *WRTL II* Court noted that the costs of discovery violated the First Amendment because the government sought discovery on a factor—the intent of the speaker—that was legally irrelevant. *WRTL II*, 558 U.S. at 468. ("No reasonable speaker would choose to run an ad covered [by such rules]...if its only defense to a criminal prosecution would be that its motives were pure").

Absent this Court's intervention, political debate will be gravely stunted in the state of Ohio. Respondents seek to evade judicial review of a speech regulation regime that—by its very nature—levies manifest transaction costs on participation in the public debate. If Respondents prevail, and drastically narrow the rights of speakers to raise pre-enforcement challenges to Ohio's "truth in politics" regime, irreparable damage will be done to "our 'profound national commitment to the principle that debate on public issues should be uninhibited,

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[2] The point is hardly novel. *See Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) (finding "it is an essential prerequisite" that a state justify under strict scrutiny "the validity of an investigation which introduces into the area of [the] constitutionally protected right[] of speech").

robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Fundamentally, leaving potential speakers to the tender mercies of partisan commissioners, county prosecutors, or the desire of an incumbent to "correct the record" "'offers no security for free discussion...[and will force speakers] to hedge and trim.'" *Buckley v. Valeo*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Such outcomes are, in part, why "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney...or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. FEC*, 558 U.S. 310, 324 (2010). This is also true where procedural rules force speakers to retain counsel and submit to burdensome state enforcement procedures time after time *rather* than seeking a single declaratory ruling.

II. Under any level of constitutional review, these burdens must be appropriately tailored to a sufficiently important governmental interest.

Content-based restrictions are "presumed invalid" unless the government demonstrates their constitutionality. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Even under "exacting scrutiny," the government must "demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of

associational freedoms." *Buckley*, 424 U.S. at 25 (internal quotations and citations omitted).

Indeed, the more novel the restriction, the greater the burden on the government to properly tailor its regulation. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). This case presents a restriction on the expression of ideas based on regulating "truth"—an area of speech that this Court has recently placed outside of the scope of government regulation. Consequently, the burdens imposed by the statute, and by the Sixth Circuit's refusal to intervene, cannot, as a matter of logic, be appropriately tailored to an interest that does not exist.

a. This Court has emphasized the general lack of a governmental interest in preventing false speech. Campaign speech of questionable veracity is best countered by a system which encourages *more* speech, not less.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *United States v. Alvarez*, 132 S. Ct. 2537, 2543-2544 (plurality op.) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)) (quotation marks omitted) (emphasis added). Regulating speech as "true" or "false" is obviously content-based. And content-based restrictions are "presumed invalid"." *Id.* (citing *Ashcroft v. ACLU*,

542 U.S. 656, 660 (2004)). Last Term, this Court rejected just such a restriction.

Significantly, that case, *United States v. Alvarez,* held that "the First Amendment requires that the Government's chosen restriction on the speech at issue be actually necessary to achieve its interest." *Id.* at 2549 (internal citation and quotation omitted). Because the government lacked any evidence that false claims to have won significant military decorations in fact resulted in honor dilution, this Court found no "causal link between the Government's stated interest and the Act." *Id.* Thus, the law failed exacting scrutiny. *Id.* at 2551. This holding is consistent with other cases examining restrictions on First Amendment rights which lack an appropriate government interest. *See, e.g. SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) ("[S]omething...outweighs nothing every time.") (internal citation and quotation omitted).

If the Stolen Valor Act's attempt to preserve the honor of our nation's highest award could not bear the burden it imposed upon the First Amendment, then Ohio's law certainly cannot: it regulates *political* speech. This Court has held for decades that "there is practically universal agreement that a major purpose of...[the First] Amendment was to protect the free discussion of governmental affairs,... of course includ[ing] discussions of candidates...." *Buckley*, 424 U.S. at 14 (quoting and applying *Mills v. Alabama*, 384 U.S. at 218 (1966)) (brackets in *Buckley*). In the balance, the speech in this case is closer to the core of the First Amendment

than the speech in *Alvarez*. Yet, because the asserted government interest is nonexistent given *Alvarez*, Ohio's interest in deterring false statements is simply not enough to justify its regulation of political speech.

The government in *Alvarez* also failed to show why counterspeech was an insufficient check on false statements. The plurality put it strongest: "[t]he Government has not shown, *and cannot show*, why counterspeech would not suffice to achieve its interest." *Alvarez*, 132 S. Ct. at 2549 (emphasis added). Rather than banning false speech, "the dynamics of free speech, of counterspeech, of refutation, can overcome the lie." *Id.* Thus, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id.* at 2550.

The First Amendment stands for the principle that the best solution to false statements, or spinning of facts, is for someone else to counter with the truth. And as Justice Holmes recognized nearly a century ago, the truth will survive the lie. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) ("the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market...That at any rate is the theory of our Constitution.").

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Dated: March 3, 2014

Respectfully Submitted,

ALLEN DICKERSON
Counsel of Record
ANNE MARIE MACKIN
TYLER MARTINEZ
ZAC MORGAN
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Suite 201
Alexandria, Virginia 22314
adickerson@campaignfreedom.org
(703) 894-6800

AMICUS CURIAE BRIEF

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AND
BRIEFS

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No. 13-193

In the

Supreme Court of the United States

SUSAN B. ANTHONY LIST, *et al.*,

Petitioners,

v.

STEVEN DRIEHAUS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

EDWARD E. MEESE III
214 Massachusetts Ave., NE
Washington, D.C. 20001

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Chapman University
Dale E. Fowler School of Law
One University Drive
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

Counsel for Amicus Curiae

Library of Congress
Law Library

QUESTION PRESENTED

1. Whether a state statute that criminalizes knowingly false statements about an elected official's voting record, and thereby permits both prior restraint of and chilling effect on arguably true core political speech, violates the Freedom of Speech protected by the First and Fourteenth Amendments?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The Center advances that mission through participation in cases of constitutional significance, including cases such as this in which the central purpose of the Freedom of Speech Clause, namely, the right of the people to criticize their elected officials, is at stake. The Center has previously appeared as *amicus curiae* in several other cases addressing core First Amendment rights, including *Harris v. Quinn*, No. 11-681 (U.S., pending); *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *Seifert v. Alexander*, 131 S.Ct. 2872 (2011) (cert. denied); *Doe v. Reed*, 561 U.S. 186 (2010); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

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[1] Pursuant to this Court's Rule 37(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The Patient Protection and Affordable Care Act, 124 Stat. 119 (2010) ("Affordable Care Act" or "Act"), is one of the most controversial statutes passed by Congress in recent memory. It has been and remains the subject of intense political debate, affecting elections even before it was adopted, *see, e.g.*, Ewan MacAskill, "Republicans take Ted Kennedy's seat in dramatic upset, . . . throwing Obama's health reform plan into doubt," The Guardian (Jan. 20, 2010).[2] Adopted in 2010 on a straight party-line vote and after significant procedural irregularities, the Act is widely regarded as the principle cause of the historic losses suffered by the President's party in the 2010 midterm congressional elections.

One of the more contentious aspects of the law at the time it was adopted in March 2010 was the fact that it appeared to permit taxpayer funding of abortion. When Scott Walker's January 2010 victory in a special election to fill the late Ted Kennedy's Massachusetts Senate seat deprived supporters of the bill of a filibuster-proof majority in the Senate (and hence of the ability to reapprove the bill if the House of Representatives amended the bill that had been approved by the Senate),[3] pro-life Democrat supporters of health care reform in the House of Representatives threatened to vote against the Senate bill because it

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[2] Available at http://www.theguardian.com/world/2010/jan/20/republicans-massachusetts-scott-brown-obama-health.

[3] *See, e.g.*, Janet Hook, "Senator-elect Scott Brown welcomed as Republican hero after upset victory in Massachusetts," McClatchy-Tribune New Service (Jan. 21, 2010), available at http://www.cleveland.com/nation/index.ssf/2010/01/senator-elect_scott_brown_welc.html.

did not include the ban on taxpayer funding of abortion that had been included in a parallel bill previously approved in the House. *See, e.g.*, Huffington Post, "Bart Stupak, Dem Threatening to Kill Health Care Bill Over Abortion, Says Deal Looks Likely" (May 8, 2010);[4] *see also* Chris Silva, "Abortion amendment threatens to derail health reform," American Medical News (Nov. 23, 2009).[5] The stand-off was finally resolved when the President promised to issue an executive order extending the long-standing ban on federal funding of abortion to the new programs created under the Act. *See, e.g.*, Brian Montopoli, "Stupak to Vote Yes on Health Care Bill," CBS News (March 21, 2010);[6] *see also* Executive Order No. 13535, § 3, 75 Fed. Reg. 15599 (Mar. 24, 2010). But that resolution only highlighted the concern raised by pro-life groups that the Affordable Care Act did in fact provide taxpayer funding for abortion. *See, e.g.*, Thomas Peters, "White House Knew Obamacare Abortion Funding 'Ban' a Sham," LifeNews.com (Nov. 15, 2011).[7]

Not surprisingly, citizen groups opposed to the new health care law determined to make a representative's vote in support of the Act a campaign issue in the 2010 midterm elections. Pro-life groups in particular, including Petitioner Susan B. Anthony List, determined

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[4] Available at http://www.huffingtonpost.com/2010/03/08/bart-stupak-dem-threateni_n_490956.html.

[5] Available at http://www.amednews.com/article/20091123/government/311239982/4/.

[6] Available at http://www.cbsnews.com/news/stupak-to-vote-yes-on-health-care-bill/

[7] Available at http://www.lifenews.com/2011/11/15/white-house-knew-obamacare-abortion-funding-ban-a-sham/.

to highlight votes in favor of the Act by purportedly pro-life members of Congress, contending that a vote in favor of the Act was a vote to allow taxpayer funding of abortion. *See, e.g.*, Steven Ertelt, "Pro-Life Democrats Criticized, Thanked in Radio Ads on Pro-Abortion Health Care," LifeNews.com (April 6, 2010).[8] One of the people on Petitioner's target list was Respondent Steve Driehaus, a member of Congress from Ohio. Petitioner's planned ad campaign included billboards with the following message: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." Pet.App.3a.

As a sitting member of Congress, Representative Driehaus certainly had an ample platform on which to respond to Susan B. Anthony List's campaign message. He could have asserted, for example, that as a result of the President's Executive Order, his vote in favor of the Act was not really a vote to allow taxpayer funding for abortions. Or he could have defended his vote as a compromise with his pro-life position that was necessary to secure health care reform. Instead, Representative Driehaus threatened legal action against the owners of the billboard that the Susan B. Anthony List had rented, under Ohio's so-called "false statement" law, Ohio Revised Code § 3517.21(B)(10), which imposes criminal sanctions for the knowing dissemination of false statements about a candidate designed to promote the election or defeat of the candidate.[9] Pet.App.3a; JA26. Representative Driehaus

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[8] Available at http://archive.lifenews.com/nat6226.html.

[9] A violation of the law is a first-degree misdemeanor punishable by up to six months in prison and fine of five thousand dollars. Ohio Rev. Code §§ 3599.40; 3517.992(V). A second conviction results in loss of voting rights. *Id.* § 3599.39.

also filed a complaint with the Ohio Elections Commission against Susan B. Anthony List itself for its alleged violations of the "false statements" law. Pet.App.3a. In both cases, Representative Driehaus sought to quash political speech that was critical of a vote he had cast in Congress. He succeeded. The billboards never went up; Susan B. Anthony List had to expend precious time and resources in the weeks immediately prior to the election defending against the complaint and staving off the risk of criminal prosecution; and other groups, including co-Petitioner Coalition Opposed to Additional Spending and Taxes, were chilled from engaging in similar speech critical of their representative in Congress.

SUMMARY OF ARGUMENT

It is hard to imagine a First Amendment violation more at the heart of the Freedom of Speech than what occurred here, a prior restraint by an elected official of core political speech during an election on a hotly contested matter of policy. Preventing prior restraints on speech was central to the purpose of those who proposed and ratified the First Amendment, and it remains a core part of this Court's First Amendment jurisprudence. That is particularly true when the prior restraint at issue is of speech critical of elected officials' performance of their duties.

The threat of criminal prosecution under the Ohio "false statements" statute also poses a very real risk of chilling core political speech. Moreover, as the facts of this case make perfectly clear, giving an agency of the government the power to determine the truth or falsity of speech criticizing the actions of government officials on hotly contested matters of policy is too fraught with the potential for abuse to be tolerated in

a nation as devoted to the free (and free-wheeling) exchange of ideas as ours is.

ARGUMENT

I. Representative Driehaus's Threatened Legal Action Under the Ohio "False Statements" Statute Operated as a Prior Restraint on SBA List's Core Political Speech.

This Court has long recognized "that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The principle is as old as the Republic itself, borrowed from the authoritative work of William Blackstone, who described that the liberty of the press "consists in laying no previous restraints upon publications." WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND, § 13 (1769); *see also* James Wilson, Speech in Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 122 (1987) ("What is meant by the liberty of the press is, that there should be no antecedent restraint upon it").

By threating legal action against the owner of the billboard on which Susan B. Anthony List had planned to convey its political message, Representative Driehaus effectively imposed a prior restraint on SBA List's planned political speech.

The prior restraint at issue here is particularly troubling because the speech was in reference to the voting record of an elected official. The principal purpose of the Freedom of Speech clause of the First Amendment was to ensure that the people could exercise their sovereign will by speaking out against the

actions of their elected representatives. As James Madison noted during House debate over the proposed Bill of Rights, "[t]he right of freedom of speech is secured; ... *the people may therefore publicly address their representatives*, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will." 1 ANNALS OF CONG. 766 (Aug. 15, 1789) (Joseph Gales ed., 1789) (statement of Rep. Madison) (emphasis added); *see also Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system").

Madison's statement reflects a sentiment widely shared by the Founders, perhaps best reflected in one of the colonial-era political references with which many of the Founders were familiar, James Burgh's *Political Disquisitions*. "[I]t certainly is one of the most atrocious abuses," Burgh wrote, "that a free subject should be restrained in his inquiries into the conduct of those who undertake to manage his affairs." James Burgh, "Of the Liberty of Speech and Writing on Political Subjects," in 3 POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES 246 (1775), *reprinted in* 5 THE FOUNDERS CONSTITUTION 120 (1787). Indeed, Burgh even warned that "if it be dangerous and penal to inquire into their conduct, the state may be ruined by their blunders." *Id.*

II. The Very Existence of Ohio's "False Statements" Law Chills Constitutionally Protected Speech.

Even had Representative Driehaus not used the Ohio "False Statements" law to effect a prior restraint on speech critical of his vote in favor of the Affordable Care Act, the Ohio law, standing alone, also poses "a threat of criminal or civil sanctions after publication" and thereby "chills" speech in violation of the First Amendment. *Nebraska Press Ass'n*, 427 U.S., at 559; *cf. Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (allowing overbreadth challenge even by one whose speech might constitutionally be prohibited because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression").

The facts of this case demonstrate just why the "chilled" prong of this Court's Free Speech jurisprudence developed. SBA List had to answer a complaint (and respond to extensive discovery) filed by a member of Congress contending that SBA List's speech about the real impact of the Affordable Care Act with respect to taxpayer funding of abortion was false. After the Ohio Elections Commission found "probable cause" that SBA List had engaged in false speech about an incumbent candidate's voting record, an investigation was launched that was onerous enough to dissuade other speakers, including co-Petitioner COAST, from making the same, hotly contested points that SBA List was making. In other words, "would-be critics of [Representative Driehaus's] official conduct [were] deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved

in court or fear of the expense of having to do so." *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

Moreover, even if SBA List's speech were false—and it is at least arguable that it was not—the First Amendment protects it absent compelling circumstances not present here. "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (citing G. Orwell, Nineteen Eighty–Four (1949) (Centennial ed.2003)).

This is particularly true when the subject of the criticism is a public official such as Representative Driehaus. Such public officials voluntarily take positions which open them up to public scrutiny and "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). Counterspeech is in most such cases a perfectly adequate corrective to even false speech.

The alternative, reflected by Ohio's statute, poses simply too great a risk to First Amendment rights. As this Court recognized in the landmark case of *New York Times Co. v. Sullivan*, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." 376 U.S., at 271 (citing *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958)).

Allowing an agency of government to determine the truth of speech that is critical of government officials on hotly contested matters of policy is fundamentally at odds with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S., at 270. Recognition of that risk to core First Amendment rights is what led this Court in *New York Times* to exempt citizens from civil or criminal liability (absent actual malice) for speech, even erroneous speech, critical of public officials. *Id.*, at 282-83. And it renders the Ohio statute here constitutionally infirm.

CONCLUSION

Ohio's so-called "false statements" law cannot be reconciled with the First Amendment's protection of core political speech. The decision of the Sixth Circuit below, which effectively insulated that statute from any pre-conviction challenge, should be reversed and the statute should be declared unconstitutional.

Respectfully submitted,

EDWIN MEESE III
214 Massachusetts Ave., NE
Washington, D.C. 20001

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

Dated: March 3, 2014

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WILLIAM VASIL, PHILIP RICHTER,
OHIO ELECTIONS COMMISSION, AND JON HUSTED,
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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, QUEENS FEDERATION OF CHURCHES, AND INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE IN SUPPORT OF PETITIONERS

KIMBERLEE WOOD COLBY
CENTER FOR LAW &
RELIGIOUS FREEDOM
OF THE CHRISTIAN
LEGAL SOCIETY
8001 Braddock Road
Springfield, Va. 22151
(703) 894-1087

FREDERICK W. CLAYBROOK, JR.
Counsel Of Record
DAVID D. JOHNSON
CROWELL & MORING, LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
rclaybrook@crowell.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Amici come before this Court as frequent practitioners of religious speech, assembly, and petition. They ask this Court to ensure that they will continue to have full access to this Court, and the lower courts, to challenge state actions that would chill the full exercise of these "first freedoms," rights which are at the core of this Republic's health, history, and continued dynamism.

The **Christian Legal Society** ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly. CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of traditional Christian beliefs.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. NAE is

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk.

grateful for the American legal tradition of freedom of speech and religious liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

The **National Hispanic Christian Leadership Conference**, the Hispanic national association of evangelicals, is America's largest Hispanic Christian organization, serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve, and represent the Hispanic born-again faith community by reconciling the vertical and horizontal elements of the Christian message via the seven directives of life, family, Great Commission, stewardship, education, justice, and youth.

The **Queens Federation of Churches** was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a board of directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Federation and its member congregations are vitally concerned for the protection of the principle and practice of freedom of speech and religious liberty as manifest in the present action.

The **Institutional Religious Freedom Alliance**, founded in 2008, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious

freedom, and advocate to the federal administration and Congress on behalf of the rights of such faith-based services.

SUMMARY OF ARGUMENT

Under the British Fraud Act of 2006, a London court recently summoned the President of the Mormon Church to appear to defend allegations that certain of its church teachings are "untrue or misleading," including that "Native Americans are descended from a family of ancient Israelites" and that "Adam and Eve lived around 6,000 years ago."[2] That, hopefully, elicits a reaction of, "That would not be possible in this country!" But it is, in effect, what has happened with the political speech attempted by Petitioners in this case.

Religious speech, assembly, and petition are at the very core of First Amendment freedoms. They are just as central to our Republic's values as political speech, if not more so. And religious claims and beliefs, similarly to political ones, are often not susceptible to experimental, historical, or scientific verify-cation. Our Constitution has firmly embedded in it the principle that the State cannot be the arbiter of religious truth claims.[3]

For these core freedoms to be protected, it is essential that the courts be open to those who are being affected by State laws that restrict the exercise of their religious liberties—and not just after the State has taken adverse action against them. When

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[2] http://religionclause.blogspot.com/2014/02/british-court-issues-summons-to-mormon.html (links "1" and "2") (last visited Feb. 25, 2014); *see* U.K. Fraud Act, 2006 (c 35), § 1.

[3] *See, e.g., United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

religious expression and assembly are colorably chilled, the courts must be open to adjudicate whether the State is acting consistently with the Constitution. Otherwise, the exercise of those freedoms will be inhibited, often in ways that would never see the light of day, to the detriment of our founding principles of a free exchange of information and tolerance of varying religious views.

We believe these principles to be well established and self-evident. If they were not, many important decisions by this Court upholding religious freedoms likely would never have reached this Court, to the great injury of our common public life. The Sixth Circuit's decision restricting access to the courts in the context of political speech we believe to be wrong and aberrational. Because the Sixth Circuit's rationale could easily be expanded to religious speech and expression, we request the Court to correct this encroachment now, and emphatically.

ARGUMENT

I. Religious Speech and Assembly Are Core Freedoms That the Federal Courts Must Protect from Being Chilled

The "first freedoms" of speech, religion, assembly, petition, and press enshrined in the First Amendment were part of a noble experiment in government that was forged in reaction to restrictions on those same freedoms in England and other homelands. The story of religious persecution that spawned the Religion Clauses is well rehearsed and need not be repeated here. "Indeed," as Chief Justice Burger explained, "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" *Church of Lukumi Babalu*

Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (Burger, C.J., concurring) and citing additional authorities).

The freedom of speech covers much more than religious speech, but, "in Anglo–American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (Scalia, J.) (plurality op.). Similarly, the freedom of assembly has its roots in religious speech. Its proponents in the first Congress specifically noted the celebrated case of the British authorities prosecuting William Penn for "unlawful assembly" when he preached to a group of Quakers on a London street.[4]

Largely in reaction to their recent experience, our forebearers established a different polity:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the

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[4] See 1 *Annals of Cong.* 759 (1790) (remarks of Rep. Page). The intimate correlation between religious worship and the right of assembly is seen in recent scholarship that observes that "the right of the people peaceably to assemble" was included as a discrete right in the First Amendment, in part, because of the familiarity of the First Congress with William Penn's trial in England in 1670 for violating "the 1664 Conventicle Act that forbade 'any Nonconformists attending a religious meeting, or assembling themselves together to the number of more than five persons . . . for any religious purpose not according to the rules of the Church of England.'" John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 24-25 (2012); *see generally* Irving Brant, *The Bill of Rights: Its Origin and Meaning* 55 (1965).

> reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).[5]

"Freedom of speech and thought," as well as the other fundamental freedoms, "flow[] not from the beneficence of the state but from the inalienable rights of the person." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012). Thus, "[i]t has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons . . . ." *Hague v. CIO*, 307 U.S. 496, 519 (1939) (Stone, J., concurring) (citing numerous cases).

As Petitioners have amply demonstrated, this Court has protected these "first freedoms" by making sure that the courts are available *as soon as those freedoms are reasonably considered to be threatened*. Religious exercise, speech, and assembly are at the core of the First Amendment protections and receive the highest level of protection, similar to political speech. Indeed, "political" speech is often motivated by religious

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[5] The "first freedom" of right to petition also has direct ties to religious freedoms, as evidenced by Madison's own "Memorial and Remonstrance" that he delivered to the Virginia General Assembly shortly before the convening of the Constitutional Convention. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 37-38, 63-72 (1947) (reprinting the document).

beliefs. This is shown, for example, in *Barnette*, in which Jehovah's Witness students refused to salute the flag due to their religious beliefs. 319 U.S. at 629.

Of course, the best evidence of the inviolability of religious speech and belief is the Establishment Clause itself, which prevents even the courts from parsing the veracity of sincere religious beliefs. As Justice Douglas stated in *Fowler v. Rhode Island*, "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." 345 U.S. 67, 69-70 (1953). *See also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

This Court's two latest decisions in this area, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and *Alvarez*, underscore the inter-relatedness of religious speech and assembly with political speech and reinforce that religious speech and assembly are entitled to the highest protection of the courts. In *Snyder*, the Court held that *political* speech motivated by an unpopular, minority *religious* belief, delivered in a grossly insensitive manner, was still subject to First Amendment protection. The Court held that the speech dealt with a matter of public concern and that such speech "is 'at the heart of the First Amendment's protection.'" 131 S. Ct. at 1215 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985) (opinion of Powell, J., quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). Such speech "occupies . . . the highest rung of

the hierarchy of First Amendment values." *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

That religious speech, assembly, and petition also occupy this highest rung cannot be questioned. They, too, deal with matters "of political, social, or other concern to the community." *Id.* at 1215 (quoting *Connick*, 461 U.S. at 146). As such, their regulation would "pose the risk of 'a reaction of self-censorship' on matters of public import." *Id.* at 1216 (quoting *Dun & Bradstreet*, 472 U.S. at 760).

The Court in *Snyder* also emphasized that, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, 'the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'" *Id.* (quoting *Texas v. Johnson*, 491 U.S. at 414, and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995)).

In *Alvarez*, the issue was whether an individual who knowingly lied about having been awarded the Medal of Honor could be prosecuted for his false statements. 132 S. Ct. at 2542. Justice Kennedy, writing for a plurality, underscored that regulation of even false speech was reserved for only narrow categories. *Id.* at 2543-47. The concurring and dissenting justices all agreed with this basic proposition, although the dissenters believed the speech in question to be appropriately regulated. The key point for present purposes is that *all* justices recognized that freedoms central to the First Amendment, such as *religious* speech and assembly, required the *highest* level of protection to ensure they are not chilled.

Writing for the Court, Justice Kennedy observed that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id.* at 2544 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("Th[e] erroneous statement is inevitable in free debate."). He continued,

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

Id. at 2547-48. Justice Kennedy concluded, "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *Id.* at 2550 (citing *Whitney v. Cal.*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) and quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

Justice Alito in dissent, while disputing that the speech in question was of central constitutional significance, recognized that the principles espoused by the majority would apply to *religious* speech.

Observing that the Court has "repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake," Justice Alito agreed that the Court has "recognized that it is sometimes necessary to 'exten[d] a measure of strategic protection' to these statements in order to ensure sufficient 'breathing space' for protected speech." *Id.* at 2563 (Alito, J., dissenting (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Justice Alito continued,

> All of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech. . . . [T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.
>
> Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken. And in these contexts, "[e]ven a false statement may be deemed to make a valuable contribution to public debate,

> since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"

Id. at 2563-64 (Alito, J., dissenting) (quoting *Sullivan*, 376 U.S. at 279 n.19 (quoting J. Mill, *On Liberty* 15 (R. McCallum ed. 1947))).

Justice Breyer in his concurrence agreed that

> 'there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech.' Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. . . . Moreover, as the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart.

Id. at 2553 (Breyer, J., concurring) (citing *Gertz,* 418 U.S. at 340-41) (citation to Justice Alito's opinion omitted).

Our history has proved the Framers correct. Time and again, regulation and restriction have been aimed at unpopular political or religious speech and assembly. Resort to the courts, while not always availing and subject to stumbles even in this Court, has been a necessary protection. One such stumble was in *Whitney*. But the words of Justice Brandeis in his concurrence have long since been vindicated,[6] and

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[6] *Whitney*'s majority opinion was overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Another frequently cited misstep was

they still ring true today. His words are just as applicable to *religious* speech and assembly as they were to the political speech and assembly at issue in that case:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375-76 (Brandeis, J., concurring in the result) (footnotes omitted).

To guard these guarantees of the First Amendment, so classically elucidated by Justice Brandeis, the courts must be open to hear challenges to state regulation of religious speech and assembly at the earliest time such regulation threatens suppression. Otherwise, as the present case demonstrates, protected speech that lies at the heart of the First Amendment will be chilled, contrary to the genius of our Founders.

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in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), which the Court overruled in *Barnette*, 319 U.S. at 630-42.

II. Decisions of This Court Demonstrate the Importance of Being Able to Challenge State Action That Chills Religious Speech and Assembly

This Court has always assumed that citizens will obey the law, and not only when they are threatened with prosecution: the "very existence" of a statute regulating religious speech or assembly may cause citizens to "refrain from constitutionally protected speech or expression." *Broadrick v. Okla.*, 413 U.S. 601, 612 (1973).

Accordingly, it "has long been recognized that the First Amendment needs breathing space and that . . . the Court has altered its traditional rules of standing" in such cases and permits plaintiffs to challenge a statute "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 611-12.[7]

If the Sixth Circuit's rule challenged in this case had been applied in cases of both recent relevance and historic importance, many such cases would not have reached the federal courts for resolution when they

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[7] *Accord Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."); *Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974) (finding standing for declaratory relief on statute regulating handbilling where plaintiff had been twice warned by police to stop, had been told that he would likely be prosecuted if he attempted it again, and had expressed a desire to resume handbilling during an upcoming election).

did. For recent cases, one need look no further than the religious speech case involving the Massachusetts "buffer zone" before the Court this term, *McCullen v. Coakley*.[8] That case involves prohibition of speech and assembly motivated by religious convictions in certain public areas classically open to such conduct. The plaintiffs did not have to violate the law and suffer prosecution before challenging it. And it is, of course, unknown how many individuals have been discouraged from such speech and assembly by the challenged statute.

This Court has consistently permitted pre-enforcement challenges to State regulation based on allegations that it chilled First Amendment rights. To cite a few examples:

- In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court accepted jurisdiction of a challenge to a new "buffer zone" statute by persons who had previously engaged in abortion education outside health care facilities and who stated that their fear of prosecution under the new statute caused them "to be chilled in the exercise of fundamental constitutional rights." *Id.* at 708-09.[9] Their chilled rights of speech and assembly were motivated by sincerely held religious beliefs concerning the morality of abortion.
- In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the

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[8] No. 12-1168, argued Jan. 15, 2014.

[9] *See also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-59 (1988) (newspaper could challenge statute prohibiting unpermitted news racks under the First Amendment without first applying for a permit or being prosecuted under the statute).

Court upheld as a valid time, place, and manner regulation a state statute restricting distribution of religious and other literature and solicitation of donations to an assigned booth at the state fair. The challenge by the religious organization was begun before the fair opened or any actual enforcement of the statute. *Id.* at 644-45.

- In *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Court struck down as overbroad a resolution that forbade all "First Amendment activities" on airport property. A peace officer brought the resolution to the attention of an individual distributing religious literature and asked him to leave, which he did, and then both he and a religious organization brought suit. *Id.* at 571-72. The Court noted that a facial challenge of the resolution was appropriate to prevent the chilling of First Amendment activities by others. *Id.* at 574 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).
- In *Epperson v. Arkansas*, 393 U.S. 97 (1968), this Court accepted jurisdiction of a public high school teacher's challenge to a 1928 statute prohibiting the teaching of evolution, even though neither she, nor any other teacher, had been threatened with prosecution. *Id.* at 99. In 1965, the state adopted a new textbook that contained a chapter describing evolutionary theory, and Epperson, a high school biology teacher, filed suit for a declaration that the statute was void. *Id.* This Court accepted jurisdiction and overturned the statute on Religion Clause grounds, even though the State

had never attempted to enforce it. *Id.* at 103; *see also id.* at 109-10 (Black, J., concurring).

- In *Lukumi*, the Court found standing for members of a Santeria church who brought a pre-enforcement challenge to a new city ordinance that was directed at their ritual of animal sacrifice. In early 1987, the church leased land and announced its plan to bring the practice of Santeria, including its ritual of animal sacrifice, into the open. In reaction, the city enacted an ordinance forbidding animal sacrifice, and the church filed suit seeking a declaration that the ordinance violated the Free Exercise Clause. This Court accepted jurisdiction, even though the record does not indicate that the church was prosecuted or even *threatened* with prosecution under the ordinance; the mere existence of an ordinance that was directed at the church's religious practices was sufficient. 508 U.S. at 524-28.

- In *Larson v. Valente*, 456 U.S. 228 (1982), the Court found standing for church members' Establishment and Free Exercise Clause challenges to a statute requiring registration prior to soliciting contributions, even though the State had only threatened to enforce but later disclaimed any intent to do so. The Court found that the mere fact that the State no longer sought to regulate the church under the act did not make the controversy "any less concrete." *Id.* at 241. Rather, the fact that the State had at one time attempted to use the act to compel the church to register under the act "[gave] appellees standing to challenge the constitutional validity of the rule." *Id.*

- In *Barnette*, the Court accepted jurisdiction of a religious freedom and freedom of speech action brought on behalf of Jehovah's Witness children who had been expelled and others who had merely been *threatened* with expulsion and prosecution for refusing to salute the flag. 319 U.S. at 630.
- In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), the Court accepted jurisdiction over a challenge by a non-participating student to the board of education's rules permitting religious education in public school, even though the rules did not involve the threat of punishment or enforcement against the student. *Id.* at 206.
- In *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), church members challenged a permitting requirement for handing out religious literature door-to-door. Without seeking a permit or facing prosecution, the church members challenged the constitutionality of the ordinance, which this Court struck down. *Id.* at 153-69.

These examples can be multiplied, but the point is clear.[10] The Sixth Circuit's rule restricting access to

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[10] There are, of course, similar cases in the courts of appeals. *E.g.*, *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002) (permitting pre-enforcement challenge on Establishment Clause grounds by church and other groups of easement retained by city which gave the LDS church the right to restrict speech on the area covered by the easement); *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1216-17 (8th Cir. 1998) (church could bring a pre-enforcement declaratory relief action challenging a city ordinance against handbilling, no one from the church having been arrested or even

the federal courts to challenge State regulation that restricts political speech is wholly out of step with the law guaranteeing access to the courts to challenge such regulation at the earliest possible time it can reasonably be considered potentially chilled. The "first freedoms" of political and religious speech, assembly, and petition populate "the highest rung of the hierarchy of First Amendment values." *Snyder*, 131 S. Ct. at 1215. The Sixth's Circuit's view jeopardizes protection of these freedoms by allowing them to be chilled, both substantively and temporally.

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threatened with arrest); *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1466 (3d Cir. 1994) (finding minister's challenges to statute on free exercise, association, and speech grounds were ripe because the state refused to waive enforcement of the statute against private citizens, despite the state indicating that it had no present intent to prosecute churches under the statute and had not done so in the past).

CONCLUSION

For the reasons stated above, *amici* request the Court to reverse the decision below.

Respectfully submitted,

KIMBERLEE WOOD COLBY
CENTER FOR LAW & RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, Va. 22151
(703) 894-1087

FREDERICK W. CLAYBROOK, JR.
Counsel Of Record
DAVID D. JOHNSON
CROWELL & MORING, LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
rclaybrook@crowell.com

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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No. 13-193

IN THE
Supreme Court of the United States

SUSAN B. ANTHONY LIST, *ET AL.*, *Petitioners*,
v.
STEVEN DRIEHAUS, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, U.S. Justice Foundation, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, Downsize DC Foundation, DownsizeDC.org, English First Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, Institute on the Constitution, Policy Analysis Center, and Constitution Party National Committee in Support of Petitioners

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
March 3, 2014

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, Free Speech Coalition, Inc., Gun Owners of America, Inc., DownsizeDC.org, and Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). Citizens United Foundation, U.S. Justice Foundation, Free Speech Defense and Education Fund, Inc., Gun Owners Foundation, Downsize DC Foundation, English First Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3), and are public charities. Institute on the Constitution is an educational organization. Constitution Party National Committee is a national political party.

The *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of state, local and national concern, the construction of state and federal constitutions and statutes and ordinances related to the rights of citizens and human and civil rights secured by law. Each organization has filed many

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae briefs in this Court and in other federal courts.

SUMMARY OF ARGUMENT

This case ostensibly concerns the standing and ripeness requirements for pre-enforcement First Amendment judicial review. Those requirements, however, cannot be addressed fully without first correctly identifying Petitioners' substantive First Amendment claim.

Respondents and the court of appeals below appear to have assumed that Petitioners' claim is that, in an effort to exclude allegedly unprotected speech from election campaigns, the Ohio false-statement law has unconstitutionally excluded Petitioners' protected speech. Respondents claim that the case is not ripe for review, because Petitioners' speech neither has been, in fact, chilled nor is likely to be chilled in the future. The circuit court below agreed, reserving review on the merits, because the First Amendment question could be answered differently in different factual settings.

Petitioners' claim is that, as a matter of law, the First Amendment prohibits Ohio from establishing an official government process to arbitrate political truth in an election campaign in which both Petitioners participated. Because the establishment of such a process, by itself, has chilled, and will continue to chill, their protected speech, Petitioners' claim is ripe for decision in that the answer to their claim does not depend upon different facts in different settings. Rather, the First Amendment issue in this case

depends solely on whether the State of Ohio has jurisdiction to police the electioneering marketplace of ideas, separating truth from alleged lies.

In sum, Respondents claim that they are endowed with the power to "determine[] and proclaim[] to the electorate the truth...." Petitioners counter that the First Amendment prohibits Ohio from establishing such a "Ministry of Truth." This First Amendment issue is not only ripe for decision, but the courts are duty-bound by the power vested in them by Article III to "say ... what the law is."

ARGUMENT

I. PETITIONERS' FIRST AMENDMENT CLAIM CONCERNS THE LAWFUL ROLE OF OHIO IN THE FREE MARKETPLACE OF IDEAS.

Before reaching the procedural questions of standing and ripeness in this case, one must first correctly identify the substantive First Amendment claim presented by Petitioners, Susan B. Anthony List ("SBA List") and The Coalition Opposed to Additional Spending and Taxes ("COAST"). *See* Laird v. Tatum, 408 U.S. 1, 10-13 (1972).

A. Respondents Misstate Petitioners' First Amendment Claim as Fact-Based.

Respondents appear to assume Petitioners' First Amendment claim to be that the Ohio law unconstitutionally "chills" protected speech through a statutory scheme designed to prohibit allegedly

unprotected speech, that is, "false statements ... made ... with knowledge that they are false or with reckless disregard as to their falsity." *See* Brief of State Respondents in Opposition to Petition for Writ of Certiorari ("Resp.") at 4-5. Thus, Respondents contend that the Sixth Circuit "decision below ... merely applied the settled law of ripeness to particular facts." *Id.* at 1. Indeed, Respondents claim that the decision below turned on "narrow facts," namely, that "SBA List never specified how its speech was chilled, and, to the contrary, kept speaking despite the [Ohio Election] Commission's preliminary proceedings." *See id.* at 2.

Further, Respondents emphasize that the Ohio Elections Commission ("OEC") has "limited powers," none of which enable it to do anything more than "declare whether it finds statements false" and "in some cases, refer its findings to county prosecutors." *Id.* at 5. Instead, Respondents point out that only the county prosecutor is invested with power to punish any alleged false statement, and even then, the OEC has no more power to make that happen than an ordinary citizen. *Id.* at 5-6. Thus, Respondents allege that, until the local prosecutor takes action, nothing that the OEC did in this case has kept SBA List and COAST from fully participating in any election campaign, nor is there any way to know whether the Ohio law will fence out SBA List and COAST in the future. *Id.* at 11-12.

According to Respondents, then, the First Amendment issue before the court is "fact-bound." *Id.* at 12. The Sixth Circuit agreed, ruling that the First Amendment question need not be addressed now

because it "'may be answered differently in different settings,'" and thus, "[t]he current factual record is insufficient to permit review." SBA List, 525 Fed. Appx. at 423.

B. Petitioners' First Amendment Claim Is, in Fact, Law-Based.

The Sixth Circuit is mistaken. At stake is Petitioners' challenge to the constitutionality of Ohio's statutory scheme which anoints OEC as the State's "Ministry of Truth[]," [2] to referee and "proclaim" the truth or falsity of claims and counterclaims in a political campaign. Brief of Petitioners ("Pet. Br.") at 11. This is a First Amendment question of law, not fact.

Petitioners' claim is fundamentally a jurisdictional one — whether the First Amendment "allow[s] the government to serve as **arbiter** of political 'truth.'" *See* Pet. Br. at 10) (emphasis added). Petitioners note that Ohio is in a group of "nearly one-third of the states [that] have statutes prohibiting 'false' statements made during political campaigns...." *Id.* at 11. Petitioners contend that, under United States v. Alvarez, 132 S.Ct. 2537 (2012), "[t]hese laws do exactly what [this Court] warned against, inserting state bureaucrats and judges into political debates and charging them with separating **truth** from oft-alleged campaign '**lies**.'" *Id.* (emphasis added). Thus, Petitioners' claim that the Ohio law — which nakedly

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[2] Pet. Br. at 11.

prohibits knowing false statements, or statements made in reckless disregard of their truth or falsity concerning a candidate for election — establishes a "blatantly unlawful regime under which bureaucrats are the supreme **fact-checkers** for every political campaign...." *Id.* at 10 (emphasis added).

Respondents do not dispute Petitioners' claim that OEC plays a substantial "fact checking" role in Ohio election campaigns. However, Respondents disagree with Petitioners' claim that the Ohio law "cannot be squared with basic free-speech principles." *See id.* at 10. Actually, Respondents reinforce Petitioners' claim by their assertion that OEC "'**determines and proclaims to the electorate the truth** of various campaign allegations.'" Resp. at 6 (emphasis added). Instead of decrying Petitioners' characterization of OEC's "'truth-declaring' function," Respondents freely endorse that function, claiming that: "[T]he statements and findings of [OEC] fall exactly within the tenet that 'the usual cure for false speech is more speech.'" *Id.*

Indeed, resting entirely upon the Sixth Circuit First Amendment opinion Pestrak v. Ohio Election Commission, 926 F.2d 573 (1991), Respondents have asserted with great confidence that the Ohio law is constitutional, because:

> [OEC] cannot initiate investigations on the front end, nor can it prosecute or impose penalties on the back end... [I]t merely stands in the middle, **assessing statements and performing** what the Sixth Circuit calls

> [OEC's] **"recommending" and "truth-declaring"** functions. [Resp. at 12 (emphasis added).]

Hence, Respondents blithely conclude, quoting Pestrak, that "to the extent [OEC] does nothing more than recommend, then its actions, *per se*, have no official weight and cannot be the cause of deprivation of constitutional rights." Resp. at 6.

C. Petitioners' Claim Rests Upon a First Amendment Bedrock Principle.

According to the First Amendment principles identified in Alvarez: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.*, 132 S.Ct. at 2547. In short, Ohio has no jurisdiction to police the marketplace of ideas. *See* Pet. Br. at 10. In 1779, Thomas Jefferson observed that:

> the **opinions** of men are **not the object** of civil government, nor under its jurisdiction. That to suffer the civil Magistrate to intrude his powers into the **field of opinion**, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty; because he being of course Judge of that tendency will make his own **opinions** the rule of judgment, and approve or condemn the sentiments of others only as they shall square with, or differ from his own. [Thomas Jefferson, "A Bill for Establishing

> Religious Freedom," reprinted in 5 The Founders Constitution, 77 (item # 37) (Kurland, P. & Lerner, R., eds., Univ. Chi. Press: 1987) (emphasis added).]

While Jefferson's Bill targeted an effort to impose a religious orthodoxy upon the people, it is noteworthy that he invoked a much broader principle applicable to all "opinions," asserting "[t]hat it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." *Id.* Thus, Jefferson proclaimed:

> that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to errour, and has nothing to fear from the conflict, **unless by human interposition,** disarmed of her natural weapons, free argument and debate; errours ceasing to be dangerous when it is permitted **freely** to contract them. [*Id.* (emphasis added).]

It is this bedrock First Amendment principle, undergirding the nation's free marketplace of ideas, upon which Alvarez stands:

> Permitting the government to decree this speech to be a criminal offense ... would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no

> clear limiting principle. [Alvarez, 132 S.Ct. at 2547.]

And it is this "basic First Amendment principle[]" upon which SBA List rests its claim that the Ohio "fact-checking" system covering "political campaigns" is unconstitutional. Pet. Br. at 10.

II. PETITIONERS' FIRST AMENDMENT CLAIM IS A RIPE CONTROVERSY.

It is undisputed that SBA List, a pro-life organization, planned to put up a billboard charging Steve Driehaus, an incumbent Congressman, with having voted for taxpayer-funded abortion, based upon Driehaus's vote for the Patient Protection and Affordable Care Act. *See* SBA List, 525 Fed. Appx. at 416-417. Next, it is undisputed that Driehaus filed a complaint with OEC, charging SBA List with violating the Ohio false-statement law. *Id.*, 525 Fed. Appx. at 417. Further, it is undisputed that an OEC panel voted 2-1 against SBA List, finding probable cause that it had made a prohibited false statement, and referred the Driehaus complaint to the full Commission. *Id.* Finally, it is undisputed that SBA List scrapped its billboard plan, and that, after losing his campaign for reelection, Driehaus withdrew his complaint. *Id.*

Unlike SBA List, COAST was never formally charged with a violation of Ohio's false statement law. *Id.*, 525 Fed. Appx. at 423. Nevertheless, upon learning of Driehaus's action against SBA List, COAST dropped its plans to criticize the Congressman,

utilizing a variety of communicative methods and making essentially the same charge as SBA List. *Id.* at 418. Both advocacy organizations indicated their future plans to criticize candidates for public office in Ohio, but alleged that their constitutional right to speak was chilled by the prospect of being charged with violation of the Ohio false statement laws. *See* Pet. Br. at 3-7.

Skipping over the question whether SBA List and COAST had standing to sue, the Sixth Circuit declined to reach the merits of their claims for Article III and "prudential reasons." *See* SBA List, 525 Fed. Appx. at 418. Citing N.R.A. v. Magaw, 132 F. 3d 272, 284 (1997), the SBA List court of appeals gave as its threshold reason that any adjudication of the First Amendment claim was "'premature,'" since it was "'anchored in future events that may not occur as anticipated, or at all.'" *Id.* In other words, the Sixth Circuit decided that "[t]he **factual** record here is not sufficiently developed to review [Petitioners'] claims,"[3] as if Petitioners were making an "as applied," rather than a "facial" challenge to Ohio's statutory scheme:

> Ohio has not **applied** its law to SBA List's speech. The Commission has not found that SBA List violated the false-statement law. And no prosecutor has taken any action upon any Commission referral. SBA List says it seeks to engage in substantially similar speech in the future. Allowing such a case to proceed

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[3] *Id.* at 422 (emphasis added).

> would require us to guess about the content and veracity of SBA List's as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law. [SBA List, 525 Fed. Appx. at 422 (emphasis added).]

As noted above, none of these considerations is relevant to Petitioners' actual First Amendment claim. At issue here is the facial constitutionality of a law that empowers a government agency, upon the filing of a complaint, to insinuate itself into a political campaign to determine and proclaim to the electorate which of two political antagonists is telling the truth. *See* Resp. at 6. To decide this foundational question, the court does not need to know the "content and veracity of SBA List's as-yet unarticulated statement," or know which side the OEC **would** take. It is enough to know that the law **empowers** OEC to exercise a "truth-declaring" function, that its panel performed such a function in the 2010 election cycle, that SBA List and COAST have firmly indicated that they are coming back to Ohio to engage in similar speech, and that the Sixth Circuit had no reason to "doubt that [they] will." *See* Warshak v. United States, 532 F.3d 521, 526 (6th Cir. 2008).

Not only do they not dispute, but Respondents concur with, Petitioners' description of the "fact-checking" role of the OEC as the State's ministry of truth in election campaigns. There is no reason to believe that role will change under the current

statutory regime and, thus, no reason to believe that Petitioners' constitutional challenge "'may be answered differently in different settings.'" *See* SBA List, 525 Fed. Appx. at 423 (citing Warshak, 532 F.3d at 528). As the Sixth Circuit previously observed in an earlier opinion refusing to dismiss a case under the ripeness doctrine, "[f]urther development of a factual record ... would not inform the court's legal analysis." *See* N.R.A. v. Magaw, 132 F3d 272, 290 (6th Cir. 1997).

Additionally, Petitioners' claim does not turn "'on an understanding of' complex factual issues,"[4] such as was the case in Warshak, upon which the Sixth Circuit below relied. Warshak involved a Fourth Amendment dispute where "the 'reasonableness' of searches [is] typically [measured by] the 'totality of the circumstances,'" and thus, "'the sort of question which can only be decided in the concrete factual context of the individual case.'" *See id.*, 532 F.3d at 528, 529. However, SBA List and COAST have submitted a First Amendment claim where "the Supreme Court has enunciated concerns that justify a lessening of the usual prudential requirements for a pre-enforcement challenge to a statute with criminal penalties." *See* N.R.A., 132 F.3d at 284-85. As is true of First Amendment cases, "the harm alleged [here] is the 'chilling effect' on the constitutionally protected right to free expression[,] lead[ing] to 'self-censorship, a harm that can be realized even without an actual prosecution.'" *Id.*, 132 F.3d at 285. *See also* Pet. Br. at 12.

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[4] 532 F.3d at 528.

III. FOR "PRUDENTIAL REASONS," THIS CASE IS RIPE FOR DECISION.

As Petitioners have summarized in their brief, "Ohio's false-statement law is far from moribund[,] the OEC 'handl[ing] about 20 to 80 false statement complaints per year.'" Pet. Br. at 53. Thus, there is no doubt that, unless overturned, the Ohio law will continue to be enforced, sending the debates over public policy in election campaigns "to be **adjudicated** by bureaucrats and/or criminal courts" rather than "to be '**resolved**' by voters." *See* Pet. Br. at 54 (emphasis added). As Petitioners have observed, in America's constitutional republic, it is the people, not the nation's civil magistrates, who are the authorized judges of truth, whether it be political, religious, or otherwise. *Id.* And for good reason. As Thomas Jefferson warned:

> [It is] the impious presumption of legislators and rulers ... who, being themselves but fallible and uninspired men, have assumed dominion over ... others, setting up their own **opinions** and **modes of thinking**, as the only true and infallible, and as such, endeavoring to impose them on others.... [Thomas Jefferson's Bill, at 5 The Founders' Constitution at 77 (emphasis added).]

The court of appeals below belittles this time-honored principle, asserting that "[w]ithholding judicial relief will not result in **undue** hardship to SBA List." SBA List, 525 Fed. Appx. at 423 (emphasis added). Indeed, the court below boldly proclaims that

"there is **no** hardship where the evidence suggests SBA List is not deterred from engaging in the very conduct that it claims is encumbered." *Id.* (emphasis added).

What alternative do SBA List and COAST have, but to soldier on — if their voices are to be heard in Ohio election campaigns? And why have SBA List and COAST persisted in this litigation to obtain a decision on the merits of their constitutional claim? "Because," as James Madison wrote in his great *Memorial and Remonstrance*, "it is proper to take alarm at the first experiment on our liberties."[5] Indeed, Madison added:

> We hold this **prudent** jealously to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America **did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents**.... We revere this lesson too much to soon forget it. [*Id.* (emphasis added).]

Prudence, then, calls for expedition, not delay, in the exercise of judicial power in **this** controversy. Indeed, it is not simply the judicial department's "province," but its "duty ... to say what the law is." *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The Sixth Circuit erred when it ruled that this case was not ripe for decision on the merits.

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[5] James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in 5 The Founders' Constitution at 82 (item # 43).

CONCLUSION

The opinion of the Sixth Circuit should be reversed.

Respectfully submitted,

MICHAEL CONNELLY
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

**Counsel of Record*
March 3, 2014

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 13-193

In The Supreme Court of the United States

SUSAN B. ANTHONY LIST, and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF NEITHER PARTY

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

BRADLEY A. SMITH
WEST VIRGINIA UNIVERSITY
COLLEGE OF LAW
101 LAW SCHOOL DRIVE
P.O. BOX 6130
MORGANTOWN, WV 26506

Counsel for Amicus Curiae

Library of Congress
Law Library

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INTEREST OF *AMICUS CURIAE*[1]

The Attorney General makes this filing in fulfillment of his duties as Ohio's chief law officer, as an officer of the Court, and as an independently elected state official. His position as *amicus* here is independent of his representation of the Ohio Elections Commission Defendants. He continues zealously to represent those State Defendants in a separate capacity, acting through experienced lawyers in the Constitutional Offices section of the Attorney General's office.[2] As set forth below, the Attorney General does not express the concerns raised in this brief lightly, but has concluded that this Court may benefit in its deliberations from further discussion of the actual workings and effect of the Ohio false statements statute in practice.

The independence of the Attorney General under the Ohio Constitution is designed to allow him to speak for the interests of the State as a whole, and for its citizens. *See* OHIO CONST., Art. III, Sec. 1; OHIO REV. CODE §§ 109.02, 109.12-14; *see also, e.g.*, *Merrill v. Ohio Dep't of Natural Resources*, 955 N.E.2d 935, 944-45 (Ohio 2011) (explaining Attorney General's independent power to determine the State's view, apart from the position of a State agency);

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or his counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted under S. Ct. R. 37.4 and the consent on file with this Court.

[2] The Attorney General has screened counsel on this brief from contact with those attorneys, and has arranged *pro bono* outside counsel for the preparation and filing of this brief.

Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999, 1008-09 (6th Cir. 2006) (same; Ohio's Attorney General "is both the State's chief legal officer and a representative of the people and the public interest," as well as "a representative of an individual officer-client").

Ohio's generalized false-statement law (OHIO REV. CODE §§ 3517.21(B)(10) and 3517.22(B)(2)) has previously been upheld against constitutional challenge in the Sixth Circuit. *Pestrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991); *Briggs v. Ohio Elections Commission*, 61 F.3d 487 (6th Cir. 1995). However, those cases were decided prior to this Court's recent decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), and the Attorney General has serious concerns about the constitutionality of the generalized false statements provisions of the Ohio Rev. Code – concerns that should warrant judicial review in an appropriate case. The Attorney General believes that for this Court to determine whether this is such a case, it must have a solid understanding of the Ohio statute and how it operates in practice.

An Attorney General has a special duty, as an officer of the Court and representative of the public, to acknowledge when the government's side might be wrong. *See, e.g.*, Seth Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001); Margaret H. Lemos, *The Solicitor General As Mediator Between Court And Agency*, 2009 MICH. ST. L. REV. 185 (2009). To be sure, such an action is reserved for rare cases. As former U.S. Solicitor General Waxman put it, "when an Act of Congress has been challenged, the Solicitor General ordinarily puts a heavy thumb on the scale"

in favor of defending the statute. *Defending Congress,* 79 N.C. L. REV. at 1078. Yet, the duty to defend is not limitless and does not preclude acknowledgment of constitutional concerns.

He may defend a statute as part of his client representation, while candidly acknowledging the statute's constitutional problems. *See Defending Congress,* 79 N.C. L. Rev. at 1081-82. He may, as the U.S. Attorney General and Solicitor General sometimes have done, proceed on two tracks, defending the client's position in one brief and separately filing a brief that acknowledges constitutional problems.

The U.S. Attorney General and Solicitor General took the latter course in *Buckley v. Valeo,* 424 U.S. 1 (1976), the landmark First Amendment case, and the U.S. Solicitor General took the same action in *Metro Broadcasting v. FCC,* 497 U.S. 547 (1990), a case concerning FCC preferences for minority-owned broadcast stations. In *Metro Broadcasting,* the Solicitor General fully advocated for a law's *un*constitutionality. In *Buckley,* Attorney General Edward Levi and Solicitor General Robert Bork noted the law's problems, without advocating a specific conclusion (while General Levi's Justice Department fully defended the law in a separate brief).

In this case the Attorney General has determined that the *Buckley* model is appropriate. As noted above, the Attorney General continues separately to vigorously represent the Ohio Elections Commission and related respondents in this case. He files this separate *amicus* brief because of the critical importance of free speech to our democratic system, and because of the potentially chilling effect of Ohio law

on civic participation by ordinary citizens. The law at issue here does not merely apply to candidates who choose to run for office, or to political committees who form to advocate an issue. It can reach any "person" who speaks her mind, and recent history suggests that the law polices not just "false" speech, but speech that indisputably is protected under the First Amendment. The Attorney General has concluded that his solemn duty in these circumstances requires him to speak out through the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

Ohio's generalized false-statements provisions, OHIO REV. CODE §§ 3517.153 (complaint); 3517.21(B) & (B)(10) (any "false statement concerning a candidate"); 3517.22(B)(2) (any "false statement" concerning a ballot proposition or issue), raise a number of potential constitutional issues that, particularly in light of *United States v. Alvarez*, 132 S. Ct. 2537 (2012), merit substantive judicial review in the appropriate case.

Under Ohio's generalized false-statement prohibitions, a complaint may be filed by "any person," including but not limited to political opponents, who must merely attest that one of the statements was "false" and made with knowledge or reckless disregard of its falsity. The allegedly false speech then will be reviewed by a state administrative body that has been selected with specific reference to the political affiliations of its members. This process begins with a "probable-cause" hearing before a panel selected by the Chair of

the Commission. Complaints filed within 90 days before an election must be heard within three days. At these expedited hearings, the Commission is not required to allow any evidence, testimony, or argument to be presented, and the hearing may be conducted without the respondent present or even notified. Even if the respondent receives notice before this hearing, is able to appear, and is allowed to present evidence or argument, the respondent may have no opportunity prior to the hearing to gain discovery or to learn the basis for the complaint, which may be conclusory in nature.

If the panel finds "probable cause" – a very low hurdle – the Commission may issues subpoenas compelling the attendance of witnesses and the production of papers, books, accounts, and reports, and may seek enforcement through contempt proceedings in the Franklin County Court of Common Pleas. Eventually, if the full Commission determines by "clear and convincing evidence" that the respondent has violated the false-statements law, the Commission may refer the matter to the appropriate county prosecutor for prosecution.

Probable-cause hearings before the Commission are open public hearings and the media is specifically required to be notified of such hearings. As a practical matter, such hearings can be manipulated by complainants so that the costs they impose on a political opponent form part of the complainant's campaign strategy. There is reason to believe that some complainants do precisely that. The impact of a state agency declaring that it has found "probable cause" that an individual has made a false statement

(often described in the press as "lied") in the immediate run up to an election can be profound. As a practical matter, cases rarely go to the full Commission prior to the election, and pre-election judicial review is extremely uncommon. As a result, candidates who find their campaigns disrupted in the final days, even for what eventually prove to be true statements, have no effective relief – the damage is done. The probable-cause finding, which does not require even a preponderance of the evidence, is perceived by a substantial part of the electorate as the definitive pronouncement of the State of Ohio as to a candidate's or other speaker's truthfulness. It is not surprising, then, that a review of the Commission's files shows that a great many charges that result in a finding of probable cause are dismissed by the complainant after the election. It is not overly cynical to believe that in many cases, this is the complainant's intended strategy from the beginning.

Numerous speakers who have not made a false statement – even under the modest burden of proof for "probable cause" – are likewise forced to devote time, resources, and energy defending themselves before the Elections Commission, typically in the late stages of a campaign. Because the Commission has no system for weeding out frivolous complaints, candidates on the receiving end of a false-statement complaint must endure these burdens no matter how weak the complaint – to fail to defend would risk a public and onerous probable-cause finding. The only alternative to risking being subjected to these procedures is to self-censor or remain silent.

Thus, in practice, Ohio's false statements law allows the State's legal machinery to be used extensively by private actors to gain political advantage in circumstances where malicious falsity cannot ultimately be established.

ARGUMENT

IN PRACTICE, THE OHIO FALSE-STATEMENTS STATUTE MAY CHILL AND PENALIZE SPEECH AT CRITICAL TIMES IMMEDIATELY BEFORE ELECTIONS.

The State of Ohio has erected a legislative scheme that, while purporting to regulate false speech arguably unprotected by the Constitution, *see Pestrak,* 926 F.2d at 577, *but see Alvarez*, 132 S. Ct. 2537, in practice repeatedly scoops within its ambit protected truthful speech. Ohio's law therefore may chill constitutionally protected political speech even if adequate safeguards are included in the law, and especially if they are not.

A review of the Ohio statutory system sheds light on the ways in which the generalized false statements provisions of OHIO REV. CODE §§ 3517.22(B)(2) & 3517.21(B)(10) may, in fact, intentionally be used by private actors to chill opposing political speech. The practical effect of these provisions is to permit a private complainant to engage the State's legal and administrative processes in order to gain a campaign advantage without ever having to prove the falsity of a statement, even to the standard of a preponderance of the evidence.

A. The Workings of Ohio's False-Statements Law.

Under Ohio's generalized false-statement prohibitions, anyone who joins in political debate and makes statements deemed to be intended to influence the outcome of an election may end up on the receiving end of a complaint filed with the Ohio Elections Commission. A complaint may be filed by "any person," including but not limited to political opponents, who must merely attest that one of the statements was "false" and made with knowledge or reckless disregard of its "falsity." *See* OHIO REV. CODE §§ 3517.153 (complaint); 3517.21(B) & (B)(10) (any "false statement concerning a candidate"); 3517.22(B)(2) (any "false statement" concerning a ballot proposition or issue). Unlike an enforcement brought by state officials, there is not even a promise or presumption that this power to file a complaint will be used "responsibly." *Cf. United States v. Stevens*, 559 U.S. 460, 480 (2010).

The speaker will then find his statements reviewed by a state administrative body that has been selected with specific reference to the political affiliations of its members. *See* OHIO REV. CODE § 3517.152. If the complaint alleges a false statement and is made within 90 days of the general election, then within three days (or seven days if good cause is shown) the Elections Commission will convene a panel to "hold a hearing on the complaint to determine whether there is probable cause to refer the matter to the full commission for a further hearing." OHIO REV. CODE §§ 3517.154(A), 3517.156(B)(1).

While no more than half the members of the panel may be members of any one political party, the members of the panel are selected by the Chair of the Commission. The Chair of the Commission, however, is selected on a partisan basis and may be from a different political party than the speaker or, indeed, from a political party with a directly opposing candidate in an imminent election. OHIO ADMIN. CODE §§ 3517-1-05(A)(1)(a) & (c). Further, once formed, these panels may be reconstituted at the discretion of the Chair. OHIO ADMIN. CODE § 3517-1-05(A)(1)(f). While it can be presumed that members of the panel seek to carry out their responsibilities free from bias and partisanship, experience and common sense suggest that the perception of some potential speakers will be otherwise. Further, it should be noted that members of the Commission are not required to have any legal training.

At expedited hearings on complaints filed within 90 days prior to a general election the Commission is not required to allow any evidence, testimony, or argument to be presented, and the hearing may be conducted *ex parte*, without the respondent present. OHIO ADMIN. CODE §§ 3517-1-10(B) and (D)(1). Even if the respondent receives notice before this hearing and is able to appear, and allowed to present evidence or argument, the respondent may have no opportunity prior to the hearing to gain discovery or to learn the basis for the complaint, which may be conclusory in nature.

The probable-cause panel may dismiss the complaint for want of probable cause, may find probable cause and refer the complaint to the full

Commission for a merits hearing, or, if the "evidence is insufficient for the panel to make a determination," may "request that an investigatory attorney investigate the complaint" and then proceed to a full Commission hearing. OHIO REV. CODE § 3517.156(C).[3] The Commission may issues subpoenas compelling the attendance of witnesses and the production of papers, books, accounts, and reports, and may seek enforcement through contempt proceedings in the Franklin County Court of Common Pleas. OHIO REV. CODE § 3517.153(B).

If the full Commission determines by "clear and convincing evidence" that the respondent has violated the false statements law, the Commission may refer the matter to the appropriate county prosecutor for prosecution, OHIO REV. CODE § 3517.155(A)(1)(c), which can result in imprisonment for up to six months, or a fine of up to $5000.00. OHIO REV. CODE § 3517.992(V).[4]

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[3] Unlike most Ohio government agencies, the Ohio Elections Commission is specifically authorized to retain attorneys and investigatory attorneys without approval or supervision of the Attorney General. OHIO REV. CODE § 3517.152 (H)(2)(a).

[4] The referral passes directly to the appropriate prosecutor. While the Ohio Code provides that the Attorney General "shall advise the prosecuting attorneys of the several counties respecting their duties," OHIO REV. CODE § 109.14, it is not clear that he has the authority to order them to prosecute or not to prosecute any particular violation, or that he has control over the prosecutor's legal position prior to an appeal to the Supreme Court of Ohio. *See* OHIO REV. CODE § 309.08 (providing that "[t]he prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by

As outlined below, while only a full Commission finding may result in legal penalties, the initial hearing by a Commission panel may be the most important part of the statute in practice. This hearing is designed to determine whether probable cause exists for further investigation. By definition, it comes before any determination of falsity, or even likelihood of falsity, is made, and it can trigger substantial investigation and discovery obligations.

Finally, it must be emphasized that the statute applies not only to campaigns or large entities, but to any "person." Thus by its express terms the law applies to an individual blogger, to a person posting a comment on Facebook or other social media, or to a homemade sign or pamphlet made by a single individual, as well as to billboards, broadcast, and print advertisements.

B. Ohio's Statutory Scheme May Have a Chilling Effect on Protected Speech.

The petitioners in this case allege that their speech is and has been chilled by the possibility of investigation and prosecution, and will again be chilled in the future. In order to evaluate this claim, the Court should consider the operation of the Ohio statutes within the unique realm of elections.

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the attorney general pursuant to section 109.83 of the Revised Code," and further providing that "[i]n conjunction with the attorney general, the prosecuting attorney shall prosecute in the supreme court cases arising in the prosecuting attorney's county * * *").

As noted above, a Commission finding of "probable cause" may trigger substantial legal obligations for a respondent to a complaint. In this case, for example, three officials of petitioner Susan B. Anthony List were noticed for depositions, and both the Susan B. Anthony List and allied organizations were subjected to extensive document requests. JA 55-58, 67-71.

Beyond the explicit legal burdens that may result from a finding of "probable cause," however, the probable-cause hearings conducted by a panel of the Ohio Elections Commission may create other chilling effects on speakers. The hearings are, by law, public hearings. OHIO ADMIN. CODE §§ 3517-1-05(C), 121.22(C). The Commission is required to give advance notice of the hearing to the press. OHIO ADMIN. CODE § 121.22(F).[5] As one federal court has noted, "[t]he hearings become part of the media 'hype' surrounding a campaign, and they can be manipulated by candidates." *Pestrak v. Ohio Elections Commission,* 670 F. Supp. 1368, 1376 (S.D. Ohio 1987) *rev'd in part on other grounds,* 926 F.2d 573 (6th Cir. 1991); *see also State of Washington v. Vote No! Committee*, 957 P.2d 691, 698-99 (Wash. 1998) (finding that Washington's false-statements law was "manipulated by candidates to impugn the electoral process rather than promote truthfulness"). For one on the receiving end of a false-statements complaint, the impact of a state agency declaring that it has found "probable cause" that an individual has

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[5] Compare this procedure to 2 U.S.C. § 437g(a)(12), providing for confidential investigations of complaints in federal campaign finance cases.

made a false statement (often described in the press as "lied") in the immediate run-up to an election can be profound.

A pre-election probable-cause determination has great effect beyond costs in time and money to the respondent. To the challenged speaker, such a determination itself may be viewed as a sanction by the State, because it is viewed as such by large segments of the electorate. Indeed, that result may be the precise outcome sought by the complainant in enlisting the State's enforcement procedure to his side in a campaign debate. A candidate who files a complaint that results in a "probable cause" finding may trumpet that in press releases and ads. *See, e.g.*, Robert Higgs, *For Ohio Candidates, Truth Can Often be Pretty Tricky*, Cleveland Plain Dealer, 2010 WLNR 21967428 (Nov. 1, 2010). In short, the stark realities of the system are such that speakers who find their statements challenged in the governmental review process may have little choice but to participate fully in the Commission's assessment of the speech at issue. And a finding of probable cause, if issued, will often harm, and is often intended by the complainant to harm, the speaker's campaign, regardless of any eventual final determination by the Commission.

And when a probable-cause finding is made close to an election, it is rare that the speaker will have the opportunity for vindication at a full Commission hearing, let alone before a court of law, before the election in question. This is important because an essential feature of an election is timeliness. The election arrives on a date certain, and once that date

has passed, it is extremely rare for any court to set aside the results of an election. A federal judicial decision to enjoin the results of an election is a "drastic, if not staggering" act. *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1962). State courts, too, are appropriately reluctant to overturn election results. "[T]he courts of Ohio are hesitant to set aside an election result and will do so only in extraordinary cases, wrought with flagrant and determinative election irregularities." Steven F. Huefner, *Recourse for Election Worker Misconduct*, *in* THE E-BOOK ON ELECTION LAW (Edward Foley, *et al.*, eds. 2004), available at http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_recount02.html#_ednref6; *see also In re Election of November 6, 1990 for the Office of Attorney General*, 569 N.E.2d 447, 449-50 (Ohio 1991) ("[C]ourts should be very reluctant to interfere with the election of public officials by the people, except to enforce rights or mandatory or ministerial duties as the statutes require. The survival of our system of government requires that proper respect be given to the will of the people as expressed at the ballot box. * * * Accordingly, we have adopted stringent standards for granting relief in election contests."). This stringent standard begets a reality: official actions that cannot be corrected before an election can rarely, as a practical matter, be remedied after an election.

It is not unduly cynical to suggest, as did the federal district court in *Pestrak*, 670 F. Supp. at 1376, that in at least some Elections Commission matters, complainants may time their submissions to

achieve maximum disruption of their political opponents while calculating that an ultimate decision on the merits will be deferred until after the relevant election. In Ohio, "savvy politicians know to make such complaints just before an election, so that the target of the complaint suffers bad publicity in the final days of the campaign, when it is too late for the complaint to be upheld or dismissed." *Speech Police*, COLUMBUS DISPATCH, 2012 WLNR 5833464 (Mar. 19, 2012). "Bringing * * * campaign practices actions against a candidate who has purportedly disseminated false statements is not always about correcting the record or remedying injury to reputation. It is often also about inflicting political damage. In this respect, the [action] itself can be a weapon of substantial political force." William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 300 (2004).

Even where the Commission does not find probable cause, the damage is often done. The speaker is forced to use time and resources responding to the complaint, typically at the exact moment that the campaign is peaking and his time and resources are best used elsewhere. In other words, the State has constructed a process that allows its enforcement mechanisms to be used to extract a cost from those seeking to speak out on elections, right at the most crucial time for that particular type of speech. And if the allegations turn out to be unfounded, there is no possibility of timely remedy.

The timing of complaints at the Commission supports the notion that some partisans may seek to

trigger actions immediately before the election, and that in such cases the finding of probable cause is itself the result that the complainant seeks. A review of Ohio Elections Commission records for 2010 and 2011 found that twenty-one complaints were filed alleging false statements under OHIO REV. CODE § 3517.22(B). Sixteen appear to have reached a probable cause panel within one week of the election. DeWine Brief *Amicus Curiae* at 13, *Coast Candidates PAC v. Ohio Elections Commission,* 2012 WL 4322517 (S.D. Ohio, Sep. 20, 2012) (NO. 1:11CV775), Doc. No. 18.

Further evidence of the manipulation of the system to penalize speech in the crucial run-up to an election, rather than to penalize false statements, is that, typically, no penalty is sought beyond the finding of a violation. From 2001 through 2011, the Elections Commission found a violation of § 3517.22(B) in 14 cases, and violations of § 3517.21(B) in 97 cases. *Id.* While the Commission reserves the authority to refer cases for prosecution, it does so only sporadically. In many cases, the Commission specifically reports that the "penalty" is the finding of a violation. *See e.g. Landis v. Scarmack*, Ohio Elections Commission, Case Summary Sheet 2012E-023 (2012), available at http://elc.ohio.gov/casesummarysheets/CaseSummary.stm ("2012 General Complaints," p. 24).

The time-sensitive nature of the election and the authoritative imprimatur given to the Commission as a purportedly expert, impartial state agency make a probable-cause hearing a serious matter, even beyond the ramifications of future hearings and

investigations. Once the State has harmed a speaker's cause by making a finding (whether of probable cause or of violation) for which no judicial review can, as a practical matter, be had before the election, many speakers feel effectively penalized for speaking.

C. The Statutory Scheme Has Few Safeguards To Protect First Amendment Rights.

The *Pestrak* appeals court upheld the constitutionality of regulating "false" speech in the forerunner to what is now OHIO REV. CODE § 3517.21(B), but also invalidated other provisions. Among other things, *Pestrak* noted that "clear and convincing evidence" was required before punishment could be levied against a speaker "in areas trenching on the first amendment." 926 F.2d at 578 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964)). By definition, the probable-cause determinations of the Commission are not based on "clear and convincing" evidence. *See* OHIO REV. CODE § 3517.156. Thus, to the extent that a probable-cause finding has the practical effect of penalizing speech, it violates this requirement of *Pestrak* using a burden of proof even lower than a preponderance of the evidence.

Further, the *Pestrak* court noted that "[e]ven when there is the strongest reason for restraint, as in the possibility of public disorder, there must be an immediate opportunity for judicial review." 926 F.2d at 578. Yet if what a complainant seeks is not a prosecution, or even a final agency action, but merely

the ability to file a complaint, to engage the chilling power of the state, and perhaps to obtain a probable-cause finding shortly before voters go to the polls, it is clear that no adequate judicial review can be had before the election. This truly is a situation where justice delayed is justice denied for the innocent speaker.

D. The Statutory Scheme Pulls Within Its Ambit Much Protected Speech.

Few respondents contest an adverse Commission finding in court because the election will be over, won or lost, by the time any judicial hearing takes place, and so the remedy is largely meaningless. Even if the speaker is ultimately victorious, that speaker gets little or nothing for his or her efforts but additional legal bills. Nevertheless, the few challenges that do take place demonstrate that the State administrative apparatus affects a good deal of speech that is well within the ambit of constitutionally protected speech, and that the remedy is rarely, if ever, a timely one.

For example, in *Service Employees International Union District 1199 v. Ohio Elections Commission*, 822 N.E.2d 424 (Ohio Ct. App. 2004), a union was vindicated and the OEC's findings reversed, but not until a full year and a half after the election. Probable cause in the matter was found within two weeks before the election. A full merits hearing was held one day before the election, at which the Commission found a false statement violation by a vote of 4-3. *Id.* at 427-28. The next year the Court of Common Pleas affirmed the Commission's finding.

Id. at 428. The case then went to the Court of Appeals, which found that "[t]he statement at issue [was] ambiguous and susceptible of different interpretations," and that even assuming falsity for the sake of analysis, the "record lacks clear and convincing evidence that SEIU knew that the statement was false or acted in reckless disregard * * *. Moreover, * * * SEIU's interpretation of the statement is rational and has a basis in fact." *Id.* at 430, 432. Thus, roughly a year and a half after the election, the matter was remanded with orders to reverse the Commission's determination against the Union.

The few other reported cases too frequently tell similar stories. *See, e.g., Flannery v. Ohio Elections Commission*, 804 N.E.2d 1032 (Ohio Ct. App. 2004) (reversing OEC finding of violation nearly two years after election; complaint had been brought against Democratic candidate for Secretary of State by incumbent's campaign manager; Commission found probable cause and ultimately violations; trial court reversed; Court of Appeals ultimately held that, "even assuming arguendo that Flannery's statements were false, the Commission failed to sustain its burden that the statements were made with actual malice."); *Committee to Elect Straus Prosecutor v. Ohio Elections Commission*, No. 07AP-12, 2007 Ohio App. LEXIS 4797 (Ohio Ct. App. 2007) (affirming trial court reversal of two findings of violations where statements were not shown to have been made with actual malice; appeals court ruling came two years and eleven months after the election in which the statements were made); *Steve Buehrer for Congress*

v. Ohio Elections Commission, No. 07CVF12-17565 (Ohio C.P., Nov. 17, 2009) (Two years after the election, Commission false statement finding reversed: "There was no evidence before the Commission that the statement was false, or * * * published * * * knowing the same to be false or with reckless disregard of whether it was false or not.").

The public documents from the Ohio Elections Commission further show the burden that the false statements law places on *protected* speech. A prior review of Commission files between 2001 and 2010, revealed that the Commission found violations of OHIO REV.CODE § 3517.21(B) in 90 cases. But the Commission dismissed another forty-eight cases after a hearing, and 112 were dismissed because the complainant withdrew the complaint or failed to prosecute (typically after the election – a further indication that the goal may often be less an ultimate finding of a violation than a probable-cause finding before the election). Two hundred sixty were dismissed with findings of "no probable cause." *Coast Candidates PAC v. Ohio Elections Commission*, DeWine Brief *Amicus Curiae* 17, n. 5.

In short, numerous speakers who have not made a false statement even under the modest burden of proof for "probable cause" are forced to devote time, resources, and energy defending themselves before the Elections Commission, typically in the late stages of a campaign. And under OHIO REV. CODE § 3517.154, the Commission cannot even weed out frivolous complaints before the probable-cause hearing unless the complaint is technically deficient. False-statement complaints almost by definition are

filed by persons with hostile political motives. For such complainants, the fact that the complaint is dismissed, whether at probable cause or after a full hearing, may be almost beside the point. The damage inflicted is the time and cost to the opposition of having to defend itself in the campaign's final days. Vindication in court 18 months or two years later is scarcely vindication at all.

To summarize, an Ohio citizen who chooses to exercise his or her civic responsibilities by speaking out on issues of the day may face the issuance of government subpoenas, targeting by a government-appointed "investigative attorney" (even absent a finding of probable cause), and a politically damaging Commission determination labeling her speech "false" just before the election, all with the threat of criminal prosecution in the background. These factors may impel the speaker to take on the burden of responding to the complaint. This is so even if the respondent believes his or her speech is true, and it comes at the time – in the days immediately before the election – when such response is most distracting and burdensome. Alternatively, the risk of such consequences may force the speaker to remain quiet or self-censor statements that could be used to trigger even a frivolous complaint.

The impact of this system on speakers cannot be trivial. And while the petitioners in this case represent relatively large non-profit organizations, for an individual pamphleteer or blogger, especially, the threat of prosecution can be terrifying. *Cf. Corsi v. Ohio Elections Comm'n,* 981 N.E.2d 919 (Ohio App.

2012), *appeal not allowed* 134 Ohio St. 3d 1485, *cert. den.* 134 S. Ct. 163 (2013).

CONCLUSION

There is ample reason to believe that Ohio's false-statements law allows the State's legal machinery to be used extensively by private actors to gain political advantage in circumstances where malicious falsity cannot ultimately be established. In light of the ongoing stream of false-statement claims made under the most generalized and unspecific of Ohio's false-statements laws – some obviously more justified than others – the Attorney General submits this filing as a friend of the Court and the legal process, in the belief that this review of the statute in actual operation may be helpful to the Court in considering the questions presented in this case.

Respectfully submitted,

BRADLEY A. SMITH
WEST VIRGINIA UNIVERSITY
COLLEGE OF LAW
101 Law School Drive
P.O. Box 6130
Morgantown, WV 26506

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-193

Supreme Court, U.S.
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In the Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,
Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* 1851 CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONERS

Maurice Thompson
1851 Center for Constitutional Law
202 E. State Street
Columbus, OH 43215
(614) 340-9817

Joshua Crousey
Law Office of William J. Rapp
1 East Main St.
Amelia, OH 45102
(513) 753-7277

Gregory A. Keyser
Counsel of Record
6657 Hitching Post Lane
Cincinnati, OH 45230
(859) 630-8079
gregkeyser@gmail.com

Counsel for Amicus Curiae 1851 Center for Constitutional Law

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTIONS PRESENTED

I. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would successfully prosecute him for that speech, as the Sixth Circuit holds, or should the Court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

II. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false statements" in elections are not subject to pre-enforcement review under the First Amendment so long as the speaker maintains that its speech is true, even if even if others who may enforce the law disagree?

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The Opinion of the United States Court of Appeals for the Sixth Circuit is found at *Susan B. Anthony List v. Driehaus*, 525 Fed.Appx. 415 (6th Cir. 2013). Two opinions of the United States District Court for the Southern District of Ohio that dismiss complaints filed by each of the two Petitioners is found at 805 F.Supp.2d 412 and 2011 WL 3296174.

IDENTITY AND INTEREST OF AMICUS

The 1851 Center for Constitutional Law is an Ohio non-profit corporation formed to promote and protect constitutional, human and civil rights.[1]

The 1851 Center works to preserve freedom of political speech, recognizing that such expression is fundamental to ensuring that citizens maintain sufficient information to oversee those who institute the public policy that can greatly impact their lives.

More specifically here, the 1851 Center has defended numerous Ohio citizens who have become entangled in one or more Ohio Elections Commissions hearings in response to wholly frivolous Complaints filed by their political rivals. In the course of these hearings, the 1851 Center has witnessed how OEC Complaints are used by the politically powerful to frighten average citizens from participating in the political process, and even critical core political speech itself.

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[1] The undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the 1851 Center, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of brief. All parties have consented to the filing of this brief.

Moreover, the 1851 Center has observed panels of unelected administrators without any legal expertise, much less First Amendment expertise, deliberate and rule on whether political value-laden statements are true or false, and mistaken or advertent.

The result of these statutes, alongside Ohio Elections Commission hearings and policies (which provide for considerable fines and even criminal prosecution), is to make political participation cost-prohibitive for Ohioans who are not professional politicians. This causes political stultification and stratification. This also paternalistically abridges the public's role as the *proper* arbiter of political claims and ideas.

Consequently, the 1851 Center is interested in overturning the Sixth Circuit Court of Appeals' Decision in this case, since providing citizens with a remedy to expeditiously vindicate their rights will result in the requisite "breathing space" Ohioans need to enter and participate in the political process (and advance changes in their government) once again.

In this case, it believes the constitution, and the American people, are served by protecting free political debate from content-based restriction such as Ohio's peculiar statutory scheme that appoints panels of politicians as arbiters of the truth of political statements, and removes such inquiry from a public marketplace of ideas. The notion of such an Orwellian scheme is antithetical to the Constitution's guiding principles of self-governance, individual liberties and, particularly, freedoms to both speak and hear political expression.

The 1851 Center for Constitutional Law is also interested in protecting fundamental constitutional protections by promoting review of government laws or other restrictions that threaten the free exercise of constitutional rights. It believes that refusal to review the constitutionality of a governmental restriction criminalizing political speech effectively extinguishes that right. Requiring a citizen to submit to criminal prosecution in order to test a statute's constitutionality not only encourages citizen disrespect of law, but discourages the free exercise of constitutional rights, especially including open political debate, that should instead be encouraged in a democratic society.

Of course, the Amicus encourages the Court to protect the free exercise of political discourse as urged by the Petitioners, in a way that permits citizens to vindicate First Amendment protections without the need to invite a criminal conviction.

STATEMENT OF THE CASE

Ohio's Criminalization and Bureaucratic Policing of Political Speech

Under Ohio law, a citizen who knowingly or recklessly publishes a false statement about a political candidate commits a crime punishable by a prison term and fine of up to $5,000. Ohio Rev. Code §§3517.21(B), 3517.992(V). And uniquely, the statute's suppression and chilling of political speech is intensified by its reliance on, as the exclusive procedure to enforce Ohio Rev. Code §3517.21(B) an entirely *private* enforcement mechanism: Any person may file a complaint with the Ohio Elections Commission ("the Commission"), a 7-

member board of political party affiliates appointed by elected officials. Ohio Rev. Code §§ 3517.21(C); 3517.152(A).

For complaints raised within 60 days of an election, a 3-member panel of the probable cause supports referring the complaint to the full Commission. Ohio Rev. Code §§ 3517.154, 3517.156. If the panel dismisses the complaint, the complainant may ask the full Commission to reconsider. If the panel finds probable cause of a violation, the full Commission must hold a hearing on the merits within 10 days, unless the parties agree to extend the time. Ohio Rev. Code § 3715.155. If the Commission finds a violation, it must refer the matter for prosecution; and it may also issue a fine.

Use of the Statute to Suppress Political Speech

Political candidates from various parties have used this criminal scheme to deter, hinder, suppress, and penalize speech criticizing candidates, especially during critical periods of pre-election debate. The proceedings deter or preclude expression on key political issues, divert candidate attention from important public issues, and keep the public from hearing and considering political speech at key times in the pre-election process.

Proceedings at the OEC in This Case

In this case, for example, the Susan B. Anthony List ("SBA"), a citizen advocacy group, criticized Mr. Driehaus, a Democratic congressman, arguing that his vote for the Affordable Care Act ("ACA") constituted a vote "for taxpayer-funded abortion." SBA intended to

publish the claim on billboards, and a second advocacy group, COAST, intended to repeat the claim.

While the ACA didn't direct payment of federal funds for abortions, it established subsidies to pay insurance premiums for low-income citizens, including insurance to cover abortions. Thus SBA argued the ACA used taxpayer funds to finance abortions, while Driehaus claimed otherwise.

Rather than debating the issue before the voting public, Driehaus filed a complaint with the OEC accusing SBA of violating Ohio Rev. Code §3517.21(B)'s criminal prohibition against false political statements. He also threatened to sue a billboard company if it erected SBA's billboards, and the billboard company refused to publish SBA's statement. Solely in response to the threat of criminal proceedings started by Driehaus, both SBA and COAST refrained from publishing their arguments to the public.

At a hearing on Driehaus' complaint, an OEC panel voted 2-1 to find probable cause of a criminal violation, with the only Republican dissenting. Before the matter was heard, Driehaus was defeated in the election and dropped his complaint.

Proceedings at the Courts Below in This Case

SBA filed this lawsuit in the United States District Court for the Southern District of Ohio to challenge the Ohio statute as a violation of rights of free speech under the First Amendment to the Constitution. While state political/administrative proceedings remained pending, the District Court stayed this action under *Younger v. Harris*, 401 U.S. 37 (1971).

COAST filed a separate lawsuit in the same Court, alleging that Driehaus' action and threats of suit had chilled its intended political speech, which was virtually identical to SBA's.

After Driehaus lost the election, he dismissed his OEC proceedings. The SBA then amended its federal Complaint to allege that it wanted to make similar future statements, but was chilled from doing so. Driehaus counterclaimed that SBA's statements had defamed him.

The District Court consolidated the two suits and summarily dismissed the claims of both SBA and COAST. As to COAST, the Court reasoned that because no complaint was actually filed against COAST, any risk of prosecution was speculative, chill of COAST's speech – which was identical to SBA's -- was subjective, and COAST's injury was too attenuated to support a claim. The Court also determined that the chilling of SBA's speech was not a cognizable injury because the complaint against SBA had not been finally determined by the Commission.

A panel of the Sixth Circuit affirmed the District Court decision. It posited that injury from the statute could not be shown merely from a history of enforcement or an allegation of the statute's chilling effect, but required an imminent threat of future prosecution – something lacking because the Commission had not made a final adjudication on SBA's speech. Moreover, because the Petitioners had not admitted that they had or would lie or recklessly disregard truth in their political speech, they had not alleged an intention to disobey the statute so as to show injury.

SUMMARY OF THE ARGUMENT

Freedom to engage in political discourse is a paramount right that serves as a cornerstone of our system of government. Any attempt by the government to limit or punish persons for engaging in such discourse is reviewed with exacting scrutiny. Here, the State of Ohio enacted a statute that criminalizes political speech. The criminalization of speech, by itself, is more than sufficient cause for concern. From a practical perspective, however, the greater concern is the ability to use the adjudicatory authority granted to the Ohio Elections Commission as a tool to harass and intimidate political foes. As set forth below, savvy politicians have advanced their campaigns and intimidated political foes by filing claims before the Ohio Elections Commission. Many of the claims have no legitimate chance of being affirmed by the Ohio Elections Commission. But regardless of whether claims before the Ohio Elections Commission are affirmed or rejected, the cost of defending against such claims and the impact on campaigns causes harm to the candidates targeted by the claims. This harm is particularly intimidating to political novices and serves to deter them from entering the arena of politics. For these reasons, the amicus requests that the Court reverse the judgment below and protect the freedom to engage in political discourse.

ARGUMENT

I. THE RIGHT TO OPEN POLITICAL DISCOURSE IS A CORNERSTONE OF OUR SYSTEM OF GOVERNMENT AND LIMITATIONS OF THAT RIGHT ARE REVIEWED WITH EXACTING SCRUTINY

Freedom to advance one's political issues, or to speak out in criticism of government and those who would occupy positions of governance, is a crucial check against abuse of state authority, underpinning a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[2] This unique American system allows for vigorous discussions:

> [D]iscussion of public issues ... integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure the unfettered exchange of ideas for the bringing about of political and social changes desired by people."[3]

This principled protection of political speech represents a profound trust in the ultimate wisdom of the American people and in their capacity to determine

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[2] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[3] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995) (internal citations omitted).

truth.[4] Thus when a law polices core political speech, American courts apply "exacting scrutiny" and reject the law unless it is "narrowly tailored to serve an overriding state interest."[5]

In *United States v. Alvarez*, this Court ruled that even false statements are protected by the First Amendment. "This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[6] In addition, all of the justices agreed that laws restricting false statements in the political context would be subject to strict scrutiny.[7]

As explained in *N.A.A.C.P. v. Button*, "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'"[8] Indeed, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one

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[4] *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530, 536 (1980).

[5] *McIntyre* 514 U.S. at 347.

[6] *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012).

[7] *Id.*

[8] *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) paraphrasing *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963).

that puts the burden of proving truth on the speaker."[9] This Court subsequently explained that our citizens, and not the government, is tasked with controlling the bounds of political debates and determining truth:

> *In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues.*[10]

Protections afforded to political speech are exceptionally strong, given that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs* * *of course includ(ing) discussions of candidates* * *"[11] This reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[12] In fact, the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[13]

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[9] *New York Times Co.*, 376 U.S. at 271 (1964).

[10] *Buckley v. Valeo* (1976), 424 U.S. 1, at 57, 96 S.Ct. 612.

[11] *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966).

[12] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964).

[13] *Buckley v. Valeo* (1976), 424 U.S. 1, 96 S.Ct. 612.

Citizens United boldly reinforced those principles by clarifying that (1) "the First Amendment does not permit laws that force speakers to retain a campaign finance attorney * * * before discussing the most salient points of our day;" and (2) "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[14]

In *Massachusetts Citizens for Life,* the Supreme Court explained as follows:

> PAC disclosure "regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. * * * Furthermore, such duties require a far more complex and formalized organization than many *small groups* could manage. * * * Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act [and] it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it."[15]

Thus "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak,"[16] and

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[14] *Citizens United,* 130 S.Ct. at 898.

[15] *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), at 255.

[16] *Id., at* 255, fn 7.

the fact that the statute's practical effect may "discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities."[17]

II. IGNORING THE PROTECTIONS RECOGNIZED BY THIS COURT, OHIO CREATES A MECHANISM FOR A COMMISSION TO REGULATE POLITICAL SPEECH

Against the First Amendment's sweeping protection for political speech, Ohio maintains an administrative and criminal scheme that, on the premise of policing only intentionally false speech, subjects core political speech to harassment through burdensome adjudication and potential criminal sanctions.

Pursuant to Ohio Rev. Code 3517.154(A)(1), "Upon the filing of a complaint with the Ohio Elections Commission, which shall be made by affidavit of any person, on personal knowledge, ... setting forth a failure to comply with or a violation of any provision ... the commission shall proceed in accordance with sections 3517.154 to 3517.157 of the Revised Code," which require at least one hearing; and additional hearings where probable cause is determined.

Therefore, regardless of the statement's truthfulness, the respondent must attend at least one hearing in Columbus, Ohio. The scheme fails to offer prompt judicial review or other safeguards to mitigate the chilling effect on political speech. To the contrary, a complaint may be filed by "any person" based on a subjective belief that another's political rhetoric is false

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[17] *Id.* at 255.

(a foregone conclusion for much legitimate political debate), and statutory administrative procedures subject the speaker to a series of evidentiary hearings and investigation, all at the whim of a political body, often during a pre-election period when communication is most urgent. Thus, the forum for evaluating truthfulness is transferred from the public marketplace to a board of administrators.

Further, a Hobson's choice arises: the speaker may abandon a contested message in hopes of settling the dispute and addressing other important issues before an election (an unfortunate but reasonable option chosen by COAST in this case); or alternatively, the speaker may divert significant time and other resources to defend the speech before the administrative body, at the expense of diverting resources from actually spreading any message, and at a risk of criminal charges.

Under either alternative, the message at issue, along with others, is undermined, either because the speaker "volunteers" silence or resources are diverted from speech. Regardless of the speaker's choice, vibrant public debate is curtailed. Meanwhile, this has phenomena has a particularly debilitating effect on a small-time, grass-roots, or non-professional political speaker, whose limited time or resources may become entirely consumed by defending himself at the OEC hearing.

Regardless of the statutes' suppression of political speech, the Court of Appeals for the Sixth Circuit has ruled that the issue is not eligible for Federal Court's review because neither SBA nor COAST were successfully prosecuted for violating the law.

According to the position articulated by the Sixth Circuit, the Petitioners cannot challenge the constitutionality of the speech-restrictive statute until they are prosecuted and either admit a violation of the statute or are adjudicated guilty. Only then will the threat of jeopardy become sufficiently imminent to justify standing based on a cognizable risk of prosecution for political speech.

Until then, a speaker facing the filing of a complaint, being subjected to multiple hearings before a political tribunal, receiving findings of probable cause of a violation, and diverting resources away from speech to defend against the charge, exhibits mere subjective concerns, according to the Sixth Circuit. The speaker's responsive action to refrain from speech is equally subjective and does not constitute standing to challenge the scheme.

This restrictive approach invites an untenable level of government control over the content of political criticism of the government. It invites political operatives to file complaints that will subject a speaker to multiple hearings, under threat of criminal prosecution, unless the speaker abandons an election-related message. After the election, when the speech can no longer influence public action, the complaint can simply be dropped without penalty to the complainant – as in this case.

However, this Court has ruled that, when challenging a government restriction on First Amendment grounds, a speaker secures standing when

he shows a "credible threat of prosecution."[18] More precisely, a person faces a credible threat of prosecution, and earns standing, when the person shows that a state regulation arguably infringes on a constitutional right, when the person's actions could be construed to violate the state restriction.[19] This Court has pointedly instructed that a speaker need not "undergo a criminal prosecution" before challenging a constitutionally-restrictive law.[20]

The Ohio regime stifles free political debate during elections, when free exchange of ideas is most crucial. In addition, politically self-interested parties use the OEC as a weapon against their opponents to chill their speech during a campaign, knowing that just one such action can entirely hobble political novices. Given the absence of any meaningful state mechanism to guard free political speech, standing in federal courts is necessary.

Despite the unequivocal logic behind the decisions of this Court in *McIntyre* and *Massachusetts Citizens for Life*, Ohio courts have affirmed the implementation of the Ohio statute. The court declared explained that it disagreed with the council challenging the OEC, "the Council, however, argues that these requirements (and the administrative costs they entail), when imposed on a small entity with only '*de minimis* forays into express advocacy' discourages its speech and, therefore,

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[18] *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979).

[19] *Id.*

[20] *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

burdens its First Amendment rights. We disagree."[21] To the contrary, as set forth below, the practical impact of Ohio statute and its implementation by the OEC restricts political speech and violates the protections afforded by this Court.

III. OHIO'S ADMINISTRATIVE SPEECH-POLICING REGIME INVITES MANIPULATION, RESULTING IN POLITICALLY SAVVY ACTORS USING THE OEC AS A SWORD TO HINDER POLITICAL OPPONENTS

In *Citizens United v. Federal Election Commission,* this Court stated, "the First Amendment does not permit laws that force speakers to retain a campaign finance attorney ... before discussing the most salient points of our day" and "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[22] Under clear United States Supreme Court and Sixth Circuit precedent, "regulations that are triggered solely by speech are in fact regulations of speech."[23]

Despite these rulings, Ohio's statute allows a politically-interested party to file a complaint against someone, no matter whether the respondent's speech is

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[21] *Corsi v. Elections Comm.*, 2012 -Ohio- 4831.

[22] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 324 (2009).

[23] *Commonwealth Brands, Inc. v. U.S.* Not Reported in F. Supp. 2d, 2009 WL 3754273 (W.D. Ky. 2009). On appeal, the Sixth Circuit endorsed this reasoning. See *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, C.A.6 (Ky.) 2012.

true or not. As a result of the complaint, the respondent must attend at least one hearing and hire an attorney since, as a candidate running for office, the respondent does not want to be associated with wrongdoing.

John Stuart Mill, explains how a respondent should not be held liable for this type of mistake:

> [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion ... all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.[24]

In contrast to these principles, Ohioans have consistently faced commission hearings and even potential fines and criminal penalties in response to clearly-protected core political speech. The recent cases below document just some of those instances, and illustrate that at stake here are the First Amendment right of virtually an Ohioan who wishes to engage in political debate, even at the smallest levels of government. And far from being an unexpected side effect of the law, the OEC boasts that politically savvy actors will "continue to hone their message and...will

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[24] John Stuart Mill, *On Liberty* (Oxford: Blackwell, 1947) at 47.

even plan to use the Commission as a part of their activities."[25] A well-oiled political machine may, indeed, have the attorneys and knowledge to use the OEC as part of their strategy. However, political novices do not have the money, time, or experience to navigate the waters of the OEC. As the cases below demonstrate, that disadvantage creates an environment that discourages political novices from entering the political arena, and in some cases from even communicating about politics at a very basic level.

In *Massey v. Wilson,* an individual running for township trustee, using the statute, initiated Ohio Elections Commission proceedings against nine separate Ohioans by simply filing a complaint-affidavit alleging that these nine citizens chatted amongst themselves about the individual being a "pornographer" and "sex offender."[26] (Massey, while on duty as a police officer, had apparently routinely transmitted nude photographs of himself to various area women.) The OEC promptly scheduled and held a probable cause hearing, requiring these nine Ohioans to hire an attorney and drive to Columbus, Ohio, three hours from their homes in Northeast Ohio, to attend the hearing and defend themselves. Only after each respondent endured this burden were the charges dismissed as "frivolous."

Consequently, without judicial intervention, even truthful chatter and gossip risks being burdened and suppressed by the OEC's adjudicatory process. This chilling effect is hardly consistent with the robust

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[25] http://elc.ohio.gov/History.stm (retrieved on 02/26/2014)

[26] *Massey v. Wilson*, OEC Case No. 2011E-077, (2011).

public debate on candidates that our founding fathers envisioned, particularly when the complainant need not even appear at the hearing to accomplish the end of chilling and stifling the speech of his political opponents. Without an avenue for judicial intervention, not even private gossip about local candidates' sex scandals is safe for discussion.

Likewise, in *Mann v. Yarbrough,* a campaign affiliate of established Congressman Pat Tiberi brought a claim to hinder the campaign of Tiberi's Republican Party primary opponent, William Yarbrough. Specifically, Mann claimed, amongst other things, that Yarbrough was too "libertarian" to be a "Republican," and thus made a false claim when indicating to the county board of elections that he was a "member of the Republican party."[27] Yarbrough moved for dismissal of the Complaint, and succeeded, but only after hiring an attorney, attending and testifying at two hearings, and incurring considerable expense and distraction during an ongoing campaign.

Simultaneously, Yarbrough was forced to deal with another Tiberi campaign supporter who filed a separate OEC Complaint asserting that Yarbrough acted to mislead voters when he created the website www.TiberiTragedy.com to satirize Congressman Tiberi's voting record, when "the website ... does not appear to promote the Tiberi campaign, but instead is in opposition to his election."[28] This Complaint was also dismissed, but again, not until after Yarbrough

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[27] *Mann v. Yarbrough*, OEC Case No. 2012E-002, Complaint of Robert J. Mann.

[28] OEC Case No. 2011E-088, Complaint of Bryan M. Griffith.

spent considerable time and expense on it. In each case, a means of judicial interdiction would have permitted Yarbrough to continue his speech in the midst of a hard-fought campaign.

In these cases, and numerous other similar cases, as candidates were coerced or diverted from delivering their message, Ohio's voting public was prevented from hearing and evaluating political speech at critical times in the election cycle.

Likewise, *L. George Distel v. Kathy Magda*,[29] the campaign committee for Magda, a political novice, distributed literature with Magda's name followed by "Ashtabula County Treasurer," without the words "for" or "elect." She did not have campaign experience, lacked financial support, and her only campaign staffer was her husband. Upon learning of the error, she apologized and changed the literature. An ally of her opponent recognized the political opportunity and filed a complaint at the OEC, alleging that Magda "knowingly and intentionally" misled voters. An OEC panel found in violation of §3517.21(B), despite referring to the error as a "common mistake." The case is currently pending on appeal.

This is anything but an isolated incident. Just one week prior to the filing of this brief, the agents of an incumbent Republican state representative filed the identical claim against a grass-roots primary challenger, alleging a violation of the statute and initiating a burdensome OEC legal proceeding where the primary challenger published literature stating

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[29] *L. George Distel v. Kathy Magda*, OEC Case No. 2012E-028.

"Dan Fogt, State Representative," rather than "Dan Fogt *for* State Representative."[30]

Unlike well-funded political machines, citizens like Magda and Fogt prepare their campaign literature on a shoestring budget, and do not have lawyers on staff to help them navigate OEC rules before speaking. Rather, enforcement of the Ohio statute by the OEC is a threat to political novices and dissuades them from public service and political activities.

The threat applies not only to honest mistakes, but is even a threat where there is no misleading statement. In *John Schneider v. Alternatives to Light Rail Transit and Stephan Louis*, John Schneider, brought a claim against Alternatives to Light Rail Transit (ALRT) and Stephan Louis.[31] Schneider claimed that ALRT and Louis were in violation of the Ohio statute based on Louis's stating, "[t]he Federal Transit Administration rates it one of the worst plans in the country,"[32] referring to a proposal regarding Cincinnati's light rail system.

The statement was based on the rating system located on Federal Transit Administration's ("FTA") website.[33] Although FTA's website did not specifically use the word "worst" when rating the light rail systems, "[t]he FTA's report is unambiguous... [I]t

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[30] *See* Complaint of Brittany Warner, OEC Case No. 2014-E-05.

[31] *John Schneider v. Alternatives to Light Rail Transit and Stephan Louis* 2002E-065, Affidavit of Complaint.

[32] *Id.*

[33] *Schneider v. ALRT and Louis*, Deposition of Louis at 47.

rates the various cities and it puts them in various categories. And our system rates one of the worst out of all the submissions to the FTA according to the FTA."[34] In addition, although FTA did not explicitly compare the transit systems to one another, a person can easily compare them with each other using the data given by FTA.[35]

After two hearings in Columbus featuring arguments and testimony, the OEC found only a partial violation.[36] Schneider used the statute as a weapon to draw attention away from the issue and to chill his opponent's speech for years afterward in their ongoing dispute about the costs and benefits of a transit system.

Likewise, in *Thomas W. Blumer v. Bob McEwen*, Thomas Blumer filed a complaint against Bob McEwen for using the titles, "Congressman," "Special Envoy for Presidents," "U.S. Representative to the European Parliament," and "Six-term Ohio Congressman" during his campaign.[37] McEwen had held all of these positions in the past and because it was common to refer to a past elected official by his former title, he argued it was appropriate to use these titles on his campaign literature.

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[34] *Id.* at 57.

[35] *Id.* at 58.

[36] *Thomas W. Blumer v. Bob McEwen*, 2005E-087, OEC Violation Findings Letter.

[37] *Blumer v. McEwen*, Complaint.

Despite this traditional understanding, after two hearings in Columbus featuring arguments and testimony, the OEC found a violation of the statute.[38] Like Schneider v. ALRT, even though the statements did not mislead the public, Blumer used the statute as a weapon against his opponent.

In another similar, complainants Flick, Haley, and Davenport brought four claims against McComb for alleged false statements.[39] They claimed that McComb's statements about the City of Lebanon voting to spend over $300,000 on a historical house and McComb's offering to give them this house for free were false.[40]

After hearings in Columbus featuring arguments and testimony, the OEC found no violation, which means McComb had to endure four attacks on speech that was true. Because Flick, Haley, and Davenport each had intimate knowledge of the events referenced by McComb, they knew the statements were true. Nonetheless, they used the OEC to intimidate McComb.

Even where alleged misconduct is minor (such as calling oneself an "organic farmer"), successfully defending a claim at the OEC is financially costly and time consuming. In *William B. Morand v. Lee*

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[38] *Blumer v. McEwen*, OEC Violation Findings Letter.

[39] *Flick v. McComb*, 2011E-052, *Haley v. McComb*, 2001E-062, *Haley v. McComb*, 2001E-067, *Davenport v. McComb*, 2001E-045

[40] *Id.*

Speidel,[41] a candidate for township trustee claimed that his opponent published campaign literature falsely accusing him of "[b]urdening the homeowner with debt to finance commercial building projects" and being "abusive to women." The original complaint was filed before the election. After losing the election, the complainant continued the OEC action and filed a second complaint, Case No. 2005E-005, alleging additional statements that he deemed to be untruthful. The Commission found probable cause to proceed with respect to various statements, including the respondent's statement that he was an "organic farmer." While the respondent grew organic crops, the parties litigated the issue of whether the respondent was an organic "farmer" because he did not sell the crops for a profit but fed them to animals on his own farm. The complaint was ultimately dismissed in its entirety after the respondent dedicated thousands of dollars and numerous hours to his defense.

Appeals of incorrect OEC decisions create even greater costs to candidates. For instance, in *Flannery v. Ohio Elections Commission*,[42] an incumbent Secretary of State asked that signs be posted in polling centers containing the word "vote" followed by his name. Flannery said the action was a crime. After two hearings, the OEC found that four of Flannery's statements violated §3517.21(B). On appeal to an Ohio trial court, the OEC decision was overturned, and the OEC lost another appeal. In the end, even though Flannery was innocent of violating §3517.21(B), he was

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[41] *William B. Morand v. Lee Speidel*, OEC Case No. 2003E-064

[42] *Flannery v. Ohio Elections Commission*, 804 N.E.2nd 1032 (Ohio App. 2004)

forced to prepare and finance OEC hearings and further litigation before state courts simply to defend legitimate political speech for an election that concluded years earlier.

Perhaps because its decisions are rendered by majority vote of a politically-interested panel, incorrect OEC decisions are not uncommon. In *Latta for Congress Committee v. Club for Growth PAC*,[43] a Republican congressional candidate complained that Club for Growth PAC violated §3517.21(B) when it said the candidate "has a record of supporting higher taxes, including voting for the 2003 tax hike Buehrer opposed and a $1 billion tax hike in 1998" and "also supported a $1 billion tax hike in 1998 that was later rejected by 80% of the voters in a referendum." After two hearings, the OEC found a violation of §3517.21(B). Once again, Ohio courts overturned the OEC decision. The OEC's inability to apply the proper standards stalled political debate and effectively punished a party for legitimate speech by forcing that party to participate in and successfully appeal the OEC proceeding.

CONCLUSION

In *Cantwell v. Connecticut*, this Court declared:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to

[43] *Latta for Congress Committee v. Club for Growth PAC*, OEC Case No. 2007-E03

> vilification of men who have been, or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[44]

Nonetheless, Ohio's statute boldly stifles political speech. It's chilling impact, as evidenced by the numerous OEC proceedings detailed above, is a detriment to society as a whole:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'[45]

Because of this statute, people must refrain from speaking because of the potential threat of litigation. The net effect is censorship. By allowing this statute to stand as is, without the option of judicial intervention, citizens of Ohio are in essence being stripped of their First Amendment Right and are prevented from hearing an unfettered debate of the issues.

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[44] *Cantwell et al. v. State of Connecticut*, 310 U.S. 296, 309 (1940).

[45] *Samuel Roth v. United States*, 354 U.S. 476, 484 (1987).

Respectfully Submitted,

Gregory A. Keyser
Counsel of Record
6657 Hitching Post Lane
Cincinnati, Ohio 45230
(859) 630-8079
gregkeyser@gmail.com

Maurice Thompson
1851 Center for Constitutional Law
208 E. State Street
Columbus, OH 43215
(614) 340-9817

Joshua Crousey
Law Office of William J. Rapp
1 East Main St.
Amelia, OH 45102
(513) 753-7277

Counsel for Amicus Curiae 1851 Center for Constitutional Law

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-193

Supreme Court, U.S.
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In the Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,
Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, and JON HUSTED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT LAWYERS ASSOCATION IN SUPPORT OF PETITIONERS

Of Counsel:

EMILY NEWMAN
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8265

JENNIFER M. KINSLEY
Counsel of Record
Assistant Professor of Law
Northern Kentucky University
Salmon P. Chase College of Law
Nunn Hall 507
Highland Heights, KY 41099
(859) 572-7998
Kinsleyj1@nku.edu

Counsel for Amicus Curiae First Amendment Lawyers Association

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Lawyers Association ("FALA") is an Illinois-based, not-for-profit organization comprised of approximately 200 attorneys who routinely represent businesses and individuals that engage in constitutionally-protected expression. FALA's members practice throughout the United States and Canada in defense of the First Amendment and, by doing so, advocate against governmental forms of censorship. Member attorneys frequently litigate the facial validity of speech-restrictive legislation, often by way of anticipatory challenges that arise when a law is newly enacted and has not yet been enforced. In fact, many of the Court's recent pre-enforcement First Amendment cases were either argued by FALA attorneys or involved the participation of FALA attorneys in some capacity. *See, e.g., Ashcroft v. Free Speech Coalition, Inc.*, 535 U.S. 234 (2002) (successful challenge to Child Pornography Prevention Act argued by FALA member and former president H. Louis Sirkin); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (successful challenge to "signal bleed" portion of Telecommunications Act argued by FALA member and current president Robert Corn-Revere). In addition, FALA has a tradition of submitting *amicus* briefs to the Court on issues

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[1] This brief was authored by the counsel for *amicus curiae* First Amendment Lawyers Association ("FALA") as listed above. No other person or entity besides FALA has contributed to the costs of preparing and submitting this brief. Counsel for both Petitioner and Respondent have filed blanket consents to the filing of *amicus* briefs. This brief is therefore submitted pursuant to Supreme Court Rule 37.3(a).

pertaining to the First Amendment. *See, e.g., City of Littleton v. Z.J. Gifts D-4, LLC*, 2004 WL 199239 (Jan. 26, 2004) (*amicus* brief submitted by FALA); *United States v. 12,200-ft Reels of Super 8mm Film*, 409 U.S. 909 (1972) (order granting FALA's motion to submit *amicus* brief).

Given the nationwide span of their experience and the specialized nature of their practices, FALA attorneys can better comment upon the practical application of the Court's pre-enforcement standing jurisprudence than perhaps any other singular person, body, client, or corporate entity. To be sure, FALA's members have repeatedly witnessed the difficult choices speakers are required to make when faced with a law that possibly restricts or even criminalizes their expression. Absent the ability to challenge the validity of such laws prior to their threatened enforcement, the clients of FALA members would likely be required to engage in self-censorship or, worse, cease their expression altogether. Such a result not only adversely affects the clients of nearly every FALA attorney, but it also contravenes the First Amendment protections FALA and its members are dedicated to preserving. FALA can therefore offer a unique perspective on the valid role that pre-enforcement facial challenges serve in shaping the Court's free speech jurisprudence.

SUMMARY OF ARGUMENT

Pre-enforcement anticipatory challenges to laws that burden or criminalize protected expression have been the leading vehicle by which the Court has shaped its First Amendment doctrine. To be sure, lawsuits seeking to invalidate regulations that violate the First Amendment on their face have been successful across

a wide variety of content and a broad spectrum of speech categories. From the campaign speech at issue in *McConnell v. Federal Election Comm'n*, 540 U.S. 90 (2003), to the sexually oriented expression restricted by the Child Pornography Prevention Act in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court has preserved an immeasurable quantity of expression by striking down speech-restrictive laws in advance of their application.

The Sixth Circuit ruling in this case threatens to undermine the important role anticipatory challenges serve by restricting their filing to only those limited instances when prosecution under the challenged law is imminent. *See Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. 2013). As discussed below, if permitted to stand, the Sixth Circuit's high standard would place an extraordinary burden on speakers and would lead to results that are antithetical to the First Amendment. For example, speakers may be unable to appropriately time the filing of a pre-enforcement challenge so as to avoid federal court abstention and may instead be unwittingly and improperly charged for violating the law. *See Younger v. Harris*, 401 U.S. 37 (1971). This forces those wishing to express themselves to shoulder the burden of defending themselves in criminal court, a costly and frightening proposition. *See Yeager v. United States*, 557 U.S. 110, 117-18 (2009). In addition, the loss of the ability to challenge a statute in advance of its application also creates an undue risk of self-censorship to avoid enforcement, as well as the increased likelihood that speakers will silence themselves altogether to avoid government interference. In each of these instances, constitutionally-protected expression is suppressed

that could have been preserved by way of an anticipatory challenge.

Amici write separately to emphasize the critical role anticipatory challenges play in preserving freedom of speech and how such challenges have provided the mechanism for invalidating a wide swath of unconstitutional regulations that would otherwise silence protected expression. As these cases reflect, a more stringent standing requirement does not facilitate the justiciability of facial challenges. Indeed, allowing anticipatory challenges is critical to addressing unconstitutional laws *before* they have a chilling effect or cause injury in having to defend or respond to enforcement activities. To protect the core values of the First Amendment, and to ensure that no more speech than necessary is silenced by unlawful governmental regulation, the Court should reject the Sixth Circuit's approach and should instead maintain its tradition of permitting parties to challenge speech-restrictive laws before they are enforced.

ARGUMENT

I. Pre-Enforcement Anticipatory Challenges Have Served An Important Role In Crafting The Court's First Amendment Free Speech Doctrine.

The Court has enjoyed a long and storied history of permitting speakers to challenge laws restricting their speech in advance of criminal prosecution. As part of this tradition, parties wishing to challenge a statute before its enforcement need only demonstrate a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."

O'Shea v. Littleton, 414 U.S. 488, 494 (1974). To be sure, speakers have never been required "to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Further, "[w]hen contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Epperson v. Arkansas*, 393 U.S. 97 (1968). When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). Indeed, plaintiffs bringing First Amendment challenges to criminal laws have never been required to "first expose [themselves] to actual arrest or prosecution." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). This standard enables a plaintiff to challenge the constitutionality of a criminal statute without being "required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* (quoting *Doe*, 410 U.S. at 188).

If permitted to stand, the Sixth Circuit's ruling in this case – that plaintiffs must face an "imminent threat of prosecution" before filing suit to challenge speech-restrictive laws – endangers the valuable role that pre-enforcement challenges have played in shaping First Amendment doctrine. *See Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415, 419-20 (6th Cir. 2013) (requiring plaintiff to demonstrate a

"real and immediate" threat of prosecution, an "indication of imminent enforcement," and that it is "likely" he or she will be "threaten[ed] with prosecution . . . soon" to establish First Amendment standing); *see also Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). As discussed below, anticipatory challenges have provided the mechanism for invalidating a wide swath of unconstitutional regulations that would otherwise silence protected expression. It is precisely because pre-enforcement lawsuits have provided the vehicle by which the courts can safeguard First Amendment rights that the Court should reject the Sixth Circuit's restrictive approach and should instead retain its traditional relaxed standing principles in the free speech context.

A. Election Speech

By way of example, the Court's doctrine regarding core political speech has arisen in large part due to anticipatory challenges to laws restricting campaign contributions and political advertisements. The development of election speech doctrine through a triumvirate of recent cases – *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003); *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); and *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010) – demonstrates this point. As noted by the Court in *Citizens United*, "[p]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence...[because] [t]he right of a citizen to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-

government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339-340.

An early pre-enforcement challenge to Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BRCA"), which extended restrictions on independent corporate expenditures, was unsuccessful in *McConnell*. *Id.* Nevertheless, the same provision was attacked in an as-applied challenge in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410 (2006), a challenge which the Court held could be maintained. *Id.* A year later, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"), the Court sustained an as-applied challenge raising a similar claim to the validity of BCRA Section 203. *Id.* In a careful attempt to simultaneously avoid overruling *McConnell* and to vindicate the First Amendment claims made by the *WRTL II* parties, the controlling opinion in *WRTL II* refrained from invalidating the statute, except as applied to the facts immediately before it. *Id.* This series of holdings ultimately led to the *Citizens United* majority's specific admonition that consideration of a facial challenge was absolutely necessary, as "[a]ny other course of decision would prolong the substantial, nationwide chilling effect caused by...prohibitions on corporate expenditures." *Citizens United*, 558 U.S. at 333. Thus, although *McConnell* did not result in the facial invalidation of the BRCA, it laid the foundation for subsequent as applied and constitutional challenges to the provision. As a result, even where unsuccessful, anticipatory challenges laid the groundwork for future decisions that protect and preserve political expression.

B. Commercial Speech and Related Corporate Expression

Although the Court reviews laws curtailing commercial speech under a somewhat more relaxed standard than other forms of protected expression, *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), pre-enforcement challenges are allowed in this context in order to preserve First Amendment values. As the Court has previously stated, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). Yet, in order to treat as skeptical those regulations that potentially curtail the First Amendment guarantee to free speech, the courts must have the opportunity to review provisions as they affect the messages contained in protected commercial expression, not after the Government has drawn its sword.

For example, at issue in *Edenfield v. Fane* was a provision of Florida's administrative code that prohibited certified public accountants (CPA's) from "direct, in-person, uninvited solicitation." *Id.* at 764. The plaintiff, a CPA who regularly made unsolicited telephone calls and scheduled individual meetings with businesses, was prohibited from promoting his CPA practice under this administrative rule. *Id.* at 763. Before the Rule was enforced against him, Fane sued in federal district court, claiming that the anti-solicitation rule violated the First Amendment, arguing that it was difficult to persuade a business to change accounting services without first having a "detailed

discussion of the client's needs and the CPA's expertise, services and fees." *Id.* at 764. The Court agreed that Fane's solicitation activities constituted protected commercial speech. *Id.* at 765. Acknowledging that commercial solicitation "may have considerable value," the Court emphasized the benefits of allowing "direct and spontaneous communication between buyer and seller." *Id.* at 766.

The risks to Fane in proceeding with his speech absent the ability to challenge the restriction in court were daunting. He could have been perceived as a law-breaker in the eyes of both current and potential clients, thereby undermining the exact purpose his speech was intended to serve. In a profession that significantly benefits from a "[p]ersonal interchange [that] enables a potential buyer to meet and evaluate the person offering the product or service," *id.* at 766, the negative association with violating the law would all but destroy Fane's ability to propose his services to potential clients. Likewise, if Fane had chosen to acquiesce to Florida's unconstitutional anti-solicitation ban, he would have been severely crippled in attempting to build his practice. *See id.* at 763. Thus, Fane's ability to challenge the law prior to its enforcement against him was critical to preserving his First Amendment rights.

Pre-enforcement challenges are critical to enforcing the right to speech by corporate purveyors across many spectrums. For example, in *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011)[2], organizations who

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[2] Although not technically a commercial speech case, *Brown* emphasizes that anticipatory challenges can preserve speech that

represented both the "video-game and software industries," brought a pre-enforcement challenge to a California law prohibiting the sale or rental of "violent video games" to minors and requiring the packaging to contain the label "18." *Id.* at 2732-33. The district court concluded the California law violated the First Amendment on its face. *Id.* The Court of Appeals affirmed, and after granting certiorari, the Court affirmed the lower court's decision. *Id.*

Reviewing the law under strict scrutiny, the Court determined that "California has singled out the purveyors of video games for disfavored treatment–at least when compared to booksellers, cartoonists, and movie producers–and has given no persuasive reason why." *Id.* at 2740. Absent a compelling justification for this differential treatment, California's "effort to regulate violent video games" failed to survive the strict scrutiny analysis. *Id.* at 2741. Yet, if instead of challenging the statute in federal court, the plaintiffs had voluntarily violated the statute and risked enforcement, they could have been penalized up to $1,000 for each separate offense. *See* Cal. Civ. Code § 1746.3 (West 2006). Considering that more than 298 million new video games are sold in the United States each year, the cost of violating the statute was simply too prohibitive to risk. *See* Stephen E. Siwek, *Video Games in the 21st Century: The 2010 Report*, Entertainment Software Association (2010), available at http://www.theesa.com/facts/pdfs/VideoGames21stC

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is related to or an integral part of a significant corporate industry. *Playboy Entertainment*, 529 U.S. 803, is instructive on this point as well.

entury_2010.pdf. Thus, without the opportunity to bring a pre-enforcement challenge, the video game and software industries would potentially have been silenced by an unduly burdensome restriction on their freedom of commercial expression.

Similar restrictions on commercial speech have been invalidated in pre-enforcement challenges brought in this Court by the pharmacy industry, *Thompson v. W. States. Med. Ctr.*, 535 U.S. 357, 360 (2002); the alcohol industry, *44 Liquormart*, 517 U.S. 484; the utility industry, *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980); and, most recently, in the lower federal courts by the tobacco industry, *see, e.g., R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012) (vacating cigarette labeling requirement and remanding to FDA). Thus, anticipatory challenges have played a significant role in preserving the right of commercial speech across a wide range of enterprise.

C. Sexually Explicit Speech

In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 861 (1997), the Court allowed a group of twenty plaintiffs to bring a First Amendment challenge to two provisions of the Communications Decency Act of 1996 "immediately after the President signed the statute." Those provisions prohibited the knowing: 1) transmission of obscene images to anyone under 18 years of age, and 2) "sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." *Id.* at 859. The Court permitted the plaintiffs' First Amendment challenge to proceed without requiring proof that they faced imminent, real, and likely prosecution. In reaching the

merits of the plaintiffs' First Amendment claim, the Court recognized that the statute at issue was a "matter of special concern" because it was a "criminal statute," and noted that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Id.* at 872. The plaintiffs' ability to challenge the statute prior to its enforcement was significant, because the Court ultimately invalidated the provisions in question, thereby preserving a vast quantity of speech on the Internet. *Id.* at 885 ("The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."); *see also Playboy Entertainment*, 529 U.S. at 826-27.

Similarly, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 243 (2002), the Court permitted a group of plaintiffs, ranging from an adult-entertainment trade association to a photographer specializing in erotic images, to bring a First Amendment facial challenge against certain provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 *et seq.* ("CPPA"). The provisions at issue in *Free Speech Coalition* prohibited the possession or distribution of sexually explicit images that appeared to depict minors, even if the images were in fact produced without using minors. *Id.* at 239. The Court allowed the plaintiffs to proceed with their challenge – without having to prove an imminent threat of prosecution – because "a law imposing criminal penalties on protected speech is a stark example of speech suppression." *Id.* at 244. And as the Court pointed out, "few legitimate . . . speakers . . . would risk distributing [material] in or near the uncertain reach of this law."

Id. As was the case with *Reno v. ACLU*, the Court granted the Free Speech Coalition's challenge to the law and invalidated the CPPA on overbreadth grounds. *Id.* at 258.

In both the *ACLU* and *Free Speech Coalition* cases, online expression was protected from government censorship directly because the plaintiffs were permitted to sue before the laws in questions were enforced against their members.

D. Licensing and Permitting Regulations on Speech

Anticipatory challenges have also played a significant role in shaping the First Amendment analysis that is applied to licensing and permitting regulations. In fact, one of the Court's leading pronouncements on First Amendment standing – *City of Lakewood v. Plain Dealer*, 486 U.S. 750 (1988) – arose in a pre-enforcement capacity. The procedural history of the case is instructive. *See Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139 (6th Cir. 1986). At issue in the case was the distribution of *The Plain Dealer* newspaper - which at the time had the largest circulation of any daily paper in Ohio - within the City of Lakewood, a Cleveland suburb with a population of approximately 60,000 people. *Id.* at 1141. The newspaper company notified the City that it wished to distribute its newspapers to the public through news racks placed on public rights of way within Lakewood and sought the City's cooperation in allowing news racks at 18 locations along three major roads. *Id.* Relying on an ordinance that prohibited the private placement of any structure on public property, the City denied the newspaper's requests and refused

a meeting with Plain Dealer officials. *Id.* The City appeared to be singling out the newspaper for disparate treatment, because it simultaneously allowed telephone booths, bus shelters, mail boxes and utility appliances on its public ways in spite of the ordinance. *Id.* at 1147. Because the City foreclosed negotiations, the newspaper filed an action in the Northern District of Ohio seeking injunctive relief and a declaration that the ordinance violated the First and Fourteenth Amendments of the Constitution. *Id.* at 1141. The district court found the prohibition unconstitutional, but delayed entry of a permanent injunction for 60 days to give the city time to amend its law. *Id.* In response, Lakewood adopted two ordinances allowing the placement of structures on city property under certain conditions. Lakewood, Ohio Codified Ordinance §§ 901.18, 901.181 (1984) (cited in *Plain Dealer*, 486 U.S. at 753). One ordinance gave the mayor authority to grant or deny annual news rack permit applications, subject to several conditions, including: 1) approval of news rack design by the Lakewood Architectural Review Board; 2) an indemnification agreement, guaranteed by a $100,000 insurance policy, to protect the City against liability for use and placement of the news racks; and 3) any "other terms and conditions deemed necessary and reasonable by the Mayor." *Id.* at § 901.18. The newspaper chose not to seek a permit under the revised ordinances. Instead, the newspaper amended its federal complaint to assert a facial challenge to the amended enactments. *Plain Dealer*, 794 F.2d at 1143. After the district court rejected the newspaper's claims, the case was appealed to the Sixth Circuit, which upheld the news rack prohibition on one

of the three major thoroughfares, but found the three licensing conditions to be unconstitutional. *Id.* at 1146.

In affirming and remanding the Sixth Circuit's decision, the Court held that the newspaper had standing to bring a facial challenge to the ordinance without first applying for and being denied a permit. *Plain Dealer*, 486 U.S. 750. As the Court explained, a licensing statute that gives government officials unbridled discretion over the permission or denial of expressive activity constitutes a prior restraint. *Id.* at 757. Alleviating such a regime may actually require a facial challenge because "the mere existence of a licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* Moreover, as the Court explained, when a licensing regime lacks standards limiting the licensor's discretion, it is difficult for courts to discern whether the licensor is engaged in impermissible content-based discrimination. *Id.* The delay and challenges "inherent in the 'as applied' challenge can itself discourage litigation," making any eventual relief "too little too late." *Id.* at 758. In this event, opportunities for speech will have been permanently lost. *Id.*

Had the restrictive approach to pre-enforcement review taken by the Sixth Circuit in this case been imposed in *Plain Dealer*, newspaper publishers, distributors, and readers alike would have been subjected to a licensing regime that indefinitely burdened their First and Fourteenth Amendment rights and created a distinct risk of prolonged government censorship. Such an outcome would also

have undermined long-standing First Amendment jurisprudence designed to limit the government's ability to suppress expression before it has been communicated, namely the doctrines of prior restraint, overbreadth, and vagueness.

In like manner, had the Sixth Circuit's restrictive approach to pre-enforcement review been imposed on the petitioners in *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), religious organizations and their individual members would have been forced to choose between violating either a criminal ordinance or expressing their deeply-held moral beliefs. The *Watchtower* case involved a Village of Stratton ordinance which made it a misdemeanor to engage in door-to-door advocacy for any "cause" without first registering for and receiving a permit from the office of the mayor. Village of Stratton, Ohio Ordinance § 1998-5; *Watchtower Bible*, 536 U.S. at 165-66. The ordinance also required that a permit bearing the permit-holder's name be carried on one's person and be produced upon demand by police or residents. *Id.*

The regulation was challenged in federal court by a group of Jehovah's Witnesses "who consider[ed] it part of their individual responsibility before Jehovah God to follow Jesus' example and obey his commandment to go from house to house to speak to the people about the Kingdom of God." Brief for *Watchtower* Petitioners, 2001 WL 1576397, at *2. The suit was filed against a backdrop of hostility between municipalities and the Jehovah's Witnesses regarding their door-to-door

ministry.[3] *Id.* Believing they derived their authority from scripture and that seeking a permit from a municipality to preach would amount to "an insult to God," the Petitioners did not apply for a permit. *Watchtower Bible*, 536 U.S. at 157-58. Instead, the Witnesses mounted a pre-enforcement facial challenge on First Amendment grounds, alleging that the ordinance interfered with their protected free speech and exercise rights. *Id.* at 153. The Court agreed. *Id.* at 150. Considering the ordinance as it applied to religious proselytizing, anonymous political speech, and the distribution of handbills, the Court found: 1) that the ordinance necessarily resulted in surrender of anonymity; 2) that the permitting requirements imposed an objective burden on religious and political speech; 3) that the ordinance effectively banned a significant amount of spontaneous speech; and 4) that the ordinance was not narrowly tailored to the village's interest in protecting the privacy of residents or preventing fraud and crime. *Id.*

Stratton is by no means the first municipality that has attempted to use permitting schemes to prohibit or regulate protected expressive activities of Jehovah's Witnesses and others. However, the breadth of First Amendment interests burdened by the Stratton ordinance is particularly noteworthy. The scope of the ordinance was so overly broad that it impinged not only the protected religious activities of Jehovah's Witnesses, but also the rights of those not before the

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[3] Difficulties between ministers associated with a particular congregation of Jehovah's Witness in Wellsville, Ohio and Village of Stratton officials dated back to at least 1979. *See* Brief for *Watchtower* Petitioners, 2001 WL 1576397.

Court, including other religious and political advocates and all potential listeners. As the Court explained, "[i]t is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible*, 536 U.S. at 165. The ability of the Jehovah's Witness Petitioners in *Watchtower* to challenge the licensing ordinance before it was enforced therefore preserved the right of countless speakers to present and consume protected expression.

II. Absent The Ability To Raise A Pre-Enforcement Challenge To The Facial Validity Of Laws Restricting Speech, Speakers Will Be Forced To Engage In Decision-Making That Is Antithetical To The First Amendment.

In light of the significant role anticipatory challenges have played in preserving free expression across a wide range of content, the elimination of pre-enforcement facial challenges would pose significant risks to both the quality and quantity of speech available in the marketplace of ideas. For example, in the commercial speech context, speakers proposing business transactions may be reluctant to place their professional reputations and livelihoods at stake by waiting until prosecution is imminent to file suit. As highlighted by the *Fane* case, it is imperative that commercial speakers have advance knowledge of whether their speech is constitutionally protected and therefore permitted or otherwise subject to governmental regulation. *Fane*, 507 U.S. at 763, 766.

Absent the ability to seek a declaratory judgment prior to enforcement, companies are not likely to invest financial and human resources in advertisements and solicitations that may result in criminal charges or hefty civil fines. As such, commercial speech will likely disintegrate if the Sixth Circuit's heightened standing requirements are upheld. And of course, curtailing speech proposing commercial transactions is likely to have an overall impact on commerce as well. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

Moreover, as was the case with the statute invalidated in *Free Speech Coalition*, 535 U.S. 234, speakers could fail to time the filing of their lawsuits appropriately and could instead wind up being criminally prosecuted under unconstitutional laws. Prior to the Court's *Free Speech Coalition* decision striking down the CPPA, several individuals had been charged with and convicted of federal felonies for violating the Act. *See, e.g., United States v. Fox*, 248 F.3d 394, 398-99 (5th Cir. 2001) (sustaining defendant's CPPA conviction and 46-month prison sentence); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000) (upholding constitutionality of defendant's CPPA conviction). These individuals shouldered the weighty burden of defending themselves against unconstitutional criminal charges, as well as serving prison sentences for invalid convictions, before the law was declared invalid. *See Yeager*, 557 U.S. at 117-18 (noting that criminal prosecution subjects defendant to "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty"). If

permitted to stand, the Sixth Circuit's decision below increases the likelihood that speakers, like Fox and Mento, who lose the race to court to aggressive prosecutors will wrongfully face criminal sanctions for their speech. And once an individual faces criminal charges, it is unlikely that he will be able to separately challenge the facial validity of the law in a civil suit or to otherwise obtain relief from prosecution. *See Younger v. Harris*, 401 U.S. 37 (1971) (requiring federal courts to abstain from ruling upon constitutional issues with state criminal prosecutions while the state criminal charges are pending). Thus, the elimination of anticipatory challenges as a vehicle for vindicating First Amendment rights would likely lead to the filing of more and more criminal charges against protected speech.

In the face of this possibility, it is also possible that speakers who are unwilling to risk imminent prosecution will censor their speech in burdensome ways or eliminate it altogether. While there is little case law to cite as actual proof of the chilling effect a speech-restrictive law imposes, that fact is self-fulfilling. Speakers who chose not to present expression because it may trigger a criminal or civil penalty do not wind up in court; rather, their First Amendment injury by its very nature occurs privately, quietly, and outside the view of the judiciary. Each of these outcomes is fundamentally antithetical to the ideal of free expression protected by the First Amendment. As such, the Sixth Circuit's restrictive standing approach cannot be permitted to stand.

CONCLUSION

For the reasons set forth in this brief, the Court should maintain its traditional standing doctrine and permit speakers to raise facial challenges to laws restricting their expression, without regard to whether an actual prosecution is imminent. As discussed above, anticipatory challenges have played an important role in shaping the Court's First Amendment jurisprudence. To be sure, the Court's leading cases involving election speech, commercial speech, sexually explicit speech, and licensing of speech-related conduct and expression have all arisen out of anticipatory challenges to facially invalid laws. By permitting speakers to raise these issues prior to prosecution, the Court has preserved a vast amount of constitutionally protected expression that would otherwise be subject to unlawful government restriction.

The potential consequences to a requirement that speakers wait to sue until they are threatened with prompt prosecution are dire. Speakers could censor their speech in order to comply with invalid laws, thereby artificially reducing the quality of protected expression available in the free speech marketplace. Speakers could also refuse to censor their speech and instead face actual criminal prosecution, in which case they would be unable to bring a facial challenge in federal court. *See Younger v. Harris*, 401 U.S. 37 (1971). In this event, those whose expression should never have been criminalized in the first place will be unfairly forced to bear the high burden of defending themselves against criminal allegations. Even worse, speakers could stop speaking altogether, reducing not only the quality of speech available on a particular

topic, but the quantity of speech as well. These outcomes are fundamentally inconsistent with the notion of free speech protected by the First Amendment.

To preserve the right of free expression, and to ensure that the government restricts no more speech than is constitutionally permissible, the Court should retain the ability to raise pre-enforcement anticipatory challenges to laws that restrict First Amendment freedoms. As *amicus curiae*, the First Amendment Lawyers Association urges reversal.

March 3, 2014

Respectfully submitted,

JENNIFER M. KINSLEY
Counsel of Record
Assistant Professor of Law
Northern Kentucky University
Salmon P. Chase College of Law
Nunn Hall 507
Highland Heights, KY 41099
(859) 572-7998
Kinsleyj1@nku.edu

Counsel for *Amicus Curiae*
First Amendment Lawyers Association

Of Counsel:

EMILY NEWMAN
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8265

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST AND COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, AND JON HUSTED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONERS

GREG LUKIANOFF
WILLIAM CREELEY
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
601 Walnut Street
Suite 510
Philadelphia, PA 19106
(215) 717-3473

JEFFREY A. ROSEN, P.C.
Counsel of Record
JOHN K. CRISHAM
JENNIFER M. BANDY
MICHAEL A. FRAGOSO
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
jeff.rosen@kirkland.com

March 3, 2014

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Pursuant to this Court's Rule 37.3, *amicus curiae* Foundation for Individual Rights in Education (FIRE) respectfully files this brief in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus FIRE is a nonpartisan, nonprofit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code, and is dedicated to promoting and protecting First Amendment rights in our nation's institutions of higher education. Originally co-founded by Alan Charles Kors and Harvey A. Silverglate, FIRE is a unique organization in which liberals, conservatives, libertarians, atheists, Christians, Jews, and Muslims have successfully worked together to defend free speech rights for all in higher education.

FIRE works to ensure that the law remains clearly and vigorously on the side of free speech on campus. As part of its advocacy efforts, FIRE supports challenges brought by students and faculty members to overbroad campus speech codes and other unconstitutional restrictions—without regard to whether the speech or expression at issue emanates from the left, right, center, or otherwise. *See, e.g.*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *With Election Day Close, Ohio University Ends Political Censorship in Dorms* (Oct. 9, 2012),

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[1] The parties have globally consented to the filing of *amicus* briefs in this case and, pursuant to Rule 37.3, letters evidencing such consent have been filed with the Clerk. In accordance with Rule 37.6, *amicus* FIRE hereby states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

http://tinyurl.com/OhioUnivSpeech (last visited March 3, 2014) (detailing FIRE's successful opposition of Ohio University's threat of discipline against student who posted a flyer criticizing the policy positions of both President Barack Obama and former Governor Mitt Romney); Azhar Majeed, *Vindicating Freedom of the Press from Alaska to Wisconsin*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Feb. 25, 2014), http://tinyurl.com/lswarly (last visited March 3, 2014) (detailing FIRE's successful lobbying of Wisconsin Governor Scott Walker to veto a budget provision from the state's Republican legislature that would have banned the independent and nonpartisan Wisconsin Center for Investigative Journalism from campus at the University of Wisconsin-Madison). And FIRE works to ensure that college students enjoy the full panoply of due process rights—including the right to counsel in disciplinary hearings. *See* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *North Carolina Becomes First State to Guarantee College Students' Right to Attorney* (Aug. 23, 2013), http://tinyurl.com/RighttoCounsel (last visited March 3, 2014) ("For many students, especially first-generation college students or those who might come from disadvantaged backgrounds, facing down a room full of deans, administrators, and university lawyers when accused of a campus crime is a hugely intimidating task.").

When the constitutionality of these speech codes is litigated, the ripeness tests employed by the courts in those cases significantly affect FIRE's ability to pursue and promote pre-enforcement First Amendment challenges that protect free speech and inquiry in public universities. Because this case

involves that same issue in another First Amendment context, the error committed by the appellate court below is highly germane to FIRE's core mission.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is hardly controversial to observe that many of the most fundamental rights reserved to our citizenry are on display in the First Amendment. Seeking to ensure their ability to exercise those very rights, petitioners Susan B. Anthony List (SBA) and Coalition Opposed to Additional Spending and Taxes (COAST) each brought pre-enforcement challenges to an Ohio law that criminalizes knowingly or recklessly "false" statements made in connection with an election. Notwithstanding the fact that the state elections commission actually found probable cause to pursue charges against SBA for criticizing a political candidate's support for the Affordable Care Act—and that state action then dissuaded COAST from voicing similar concerns—the Sixth Circuit in this case held that neither of the petitioners' First Amendment pre-enforcement challenges were ripe.

The problem, as petitioners explain in detail, *see* Br. for Pets. 15–30, is that the Sixth Circuit's cramped approach to the ripeness standard cannot be squared with this Court's precedents, and it stands as an outlier amongst its sister circuits. And while petitioners amply explain why there is little doubt that leaving the lower court's decision undisturbed will improperly shut down the very sort of core political speech voiced by petitioners, its holding poses no less of a threat to First Amendment rights in another vital context—our Nation's public universities.

This Court long has recognized the primacy of free speech on campus and observed that protecting such speech is and always will be of critical import to the future of our polity, a future which of course contemplates that university environs will continue to foster the development of our future citizens, leaders, and lawmakers. As the Court put it a half-century ago:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

Despite this clear command that students and faculty must remain free to exercise their First Amendment rights, public universities routinely enact overbroad campus speech codes that necessarily "cast a pall of orthodoxy" on public campuses by threatening and punishing the very free exchange of ideas that is "a special concern of the First Amendment." *Id.* And as *amicus* FIRE's experience continues to show, these overbroad speech codes are notably effective in achieving their goals; that is to say, university speech codes have had the the actual effect of chilling speech on campus. Precisely to avoid this irretrievable loss of

constitutionally protected expression, courts have routinely permitted pre-enforcement challenges to vague and overbroad laws proscribing speech on college campuses. The decision below in this case threatens to shutter this essential window to obtaining relief, leaving literally hundreds of thousands of public university students and faculty in Kentucky, Michigan, Ohio, and Tennessee without means to seek judicial review of infringements on their First Amendment rights.

The Sixth Circuit achieved this unfortunate result by artificially constricting the standard under which plaintiffs bring pre-enforcement First Amendment challenges. In so doing, the appellate court appears to have departed from every other circuit to address the issue. And by incorrectly holding that petitioners failed to show a credible fear of prosecution because they did not establish that Ohio had previously enforced the law and that the statute would definitely proscribe their speech, the Sixth Circuit not only applied the wrong standard but simultaneously disregarded the facts: after all, the Ohio Elections Commission did issue a finding of probable cause that SBA List's speech violated the statute, which in turn caused COAST to refrain from voicing similar criticisms, both of which should have allowed petitioners to pursue their facial overbreadth challenges on the merits.

The decision below cannot stand consistent with the First Amendment. If the analytical framework applied below remains good law in the Sixth Circuit. then there is little doubt that the threat of self-censorship will become a reality. This result is untenable: As this Court long has recognized, the cost of self-censorship—particularly in the university

context—simply cannot be overstated, because without pre-enforcement challenges to laws that arguably prohibit speech, significant constitutionally protected rights will go unexercised for fear of prosecution.

Amicus FIRE respectfully submits that this Court should reverse the Sixth Circuit's judgment and take this opportunity to clarify the ripeness standard that applies to pre-enforcement challenges under the First Amendment. In particular, the Court should hold that every statute that arguably covers speech carries a credible threat of prosecution, and certainly does where the government cannot demonstrate that the statute has fallen out of use. Such a rule would reaffirm this Court's robust protection of the very free-expression rights that in many ways can be said to be the first principle underlying our constitutional experiment in democracy.

ARGUMENT

I. If The Sixth Circuit's Decision Is Allowed To Stand, It Will Chill Other Important Types Of Protected Expression, Including Speech And Ideas At Our Public Universities.

Just as the Sixth Circuit's decision improperly curtails pre-enforcement First Amendment challenges to state laws proscribing so-called "false" political speech, it will also unnecessarily constrain the ability of students and faculty members to raise pre-enforcement First Amendment challenges in public universities, where state officials too often seek to proscribe unwelcome but protected speech. Sometimes these restrictions are abuses meant to preclude criticism of university officials; other times, they are well-intended yet overbroad restrictions that

nonetheless impose an orthodoxy. Too often, all across the country, colleges and universities maintain and promulgate overbroad speech and "harassment" codes, many of which are specifically designed to censor otherwise protected First Amendment speech by students and faculty.

And while challenges to these codes and the chilling environments they create frequently are successful, the ability to continue to challenge such policies necessarily is contingent upon the availability of pre-enforcement review. In direct conflict with decades of this Court's precedents, as well as the decisions of its sister circuits, the Sixth Circuit's decision inevitably will restrict the ability to pursue pre-enforcement challenges and thus will jeopardize essential free speech rights of university students and professors. Regardless of whose orthodoxy is imposed, all will be harmed by this denigration of the First Amendment's "marketplace of ideas" if decisions like the one below are not reversed by this Court.

A. This Court Long Has Held That The First Amendment Provides Special Protection For Speech At Public Universities.

Schools occupy a privileged place in our nation's free speech jurisprudence; indeed, "'[t]he vigilant protection of constitutional freedoms *is nowhere more vital than in the community of American schools.*'" *Keyishian*, 385 U.S. at 603 (quoting *Shelton*, 364 U.S. at 487) (emphasis added). Such protection is necessary both for the preservation of democratic ideals and the development of tomorrow's leaders, which is why courts repeatedly hold that free inquiry among students and teachers in universities is essential to the preservation of democratic values.

See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the *vital role in a democracy* that is played by those who guide and train our youth. ... Scholarship cannot flourish in an atmosphere of suspicion and distrust.") (emphasis added); *see also Keyishian*, 385 U.S. at 603 ("[T]he First Amendment ... does not tolerate laws that cast a pall of orthodoxy over the classroom."). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Sweezy*, 354 U.S. at 250. And the stakes here are high: If students or professors are stripped of their right to free inquiry, then "our civilization will stagnate and die." *Id.*

It should come as no surprise, then, that nurturing free exchange is of particular import in our public colleges and universities. It is almost axiomatic to state that "[t]he classroom is peculiarly the 'marketplace of ideas.'" *Keyishian*, 385 U.S. at 603 (citation omitted). Responsible self-government requires mutual respect and an appreciation for intellectual diversity, both of which come about as a result of the unfettered give-and-take of ideas and arguments encountered in a properly functioning classroom. *See id.* ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'") (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.)); *see also McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242 (3d Cir. 2010) ("It is well recognized that the college classroom with its

surrounding environs is peculiarly the marketplace of ideas, and the First Amendment guarantees wide freedom in matters of adult public discourse.") (internal quotation marks and modifications omitted).

For all of these reasons, this Court repeatedly has held that the full panoply of First Amendment protections applies to campus speech—irrespective of the identity or cause of the speaker. When Central Connecticut State College attempted to deny official recognition to a Students for a Democratic Society chapter, for example, this Court unanimously concluded that the school had violated the students' constitutional rights. *See Healy v. James*, 408 U.S. 169, 171 (1972) (applying First Amendment protections to public college students and noting that "[w]e also are mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order. Where these interests appear to compete, the First Amendment, made binding on the States by the Fourteenth Amendment, strikes the required balance"). When the University of Virginia discriminated against student speech on the basis of viewpoint, the Court held that those regulations violated the First Amendment as well. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

The federal appellate courts likewise have recognized that the First Amendment affords campus speech robust protection, even when competing

values might be involved. As Judge Pryor observed when the Eleventh Circuit evaluated a diversity "remediation" requirement for a graduate student, university regulations that amount to prior restraints on student speech are subject to a heavy presumption of unconstitutionality:

> [W]e have never ruled that a public university can discriminate against student speech based on the concern that the student might, in a variety of other circumstances, express views at odds with the preferred viewpoints of the university. Our precedents roundly reject prior restraints in the public school setting. As Judge Wisdom wrote over forty years ago, "When the restriction upon student expression takes the form of an attempt to predict in advance the content and consequences of that expression, it is tantamount to a prior restraint and carries a heavy presumption against its constitutionality."

Keeton v. Anderson-Wiley, 664 F.3d 865, 882 (11th Cir. 2011) (Pryor, J., concurring) (quoting *Univ. of S. Miss. Chapter of the Miss. Civil Liberties Union v. Univ. of S. Miss.*, 452 F.2d 564, 566 (5th Cir. 1971)). Similarly, the Seventh Circuit has noted that this Court's jurisprudence is clear that even "antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006). And courts have reinforced these principles across the country in striking down

improper restrictions on student speech in public colleges and universities.

B. Overbroad Campus Speech Codes Nevertheless Exist And Chill Protected Speech Around The Country.

Despite the settled principle that the First Amendment provides robust protection for campus speech, college administrators continue to enact regulations that chill constitutionally protected speech, even where some or all of the provisions were not intended to have that effect. Campus speech codes are regulations enacted by colleges or universities that seek to proscribe unprotected speech or conduct, such as "harassment," but which often (if not always) are written in vague or overbroad ways. Courts have routinely struck down as unconstitutional these sorts of overbroad speech and "harassment" codes. *See, e.g.*, *McCauley*, 618 F.3d 232 (striking down speech code provisions as unconstitutionally overbroad and finding standing for student who had not violated the challenged provisions); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment code challenged by a graduate student even after the school amended the code); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (striking down a university speech code while not protecting the use of a racial slur by a college basketball coach); *College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (granting a preliminary injunction against a student conduct code's civility requirement as overbroad); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (striking down as unconstitutionally overbroad a Texas Tech University speech code); *Bair v. Shippensburg Univ.*, 280 F.

Supp. 2d 357 (M.D. Pa. 2003) (same at Shippensburg University); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisc. System*, 774 F. Supp. 1163 (E.D. Wisc. 1991) (striking down as overbroad portions of the University of Wisconsin's anti-discrimination code); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (striking down as overbroad and vague a University of Michigan discriminatory harassment policy).

Notwithstanding this long line of authority forbidding these sorts of unconstitutional incursions on First Amendment rights, problematic public university speech codes continue to be the rule and not the exception. In 2013, *amicus* FIRE reviewed the state of affairs at 323 public colleges, and found that *over fifty-seven percent* of them had "at least one policy both clearly and substantially restricting freedom of speech." *See* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *Spotlight on Speech Codes 2014* at 3–4, http://tinyurl.com/Fire-2013-Final-Report (last visited March 3, 2014). *Nearly forty percent more* were found to maintain "policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict only a narrow category of speech." *Id.* Most startling, however, is that *only four percent* of these schools were found not to seriously threaten protected student speech. *Id.* And while this represents an improvement from only six years ago (when the breakdown on these three categories was seventy-nine percent, to nineteen percent, to two

percent), clearly much work remains to be done in protecting free speech on campus.[2]

Efforts by college and university administrators to stifle free speech in the pursuit of ideological goals are, unfortunately, not without support from within the university walls. Many academics actually encourage the proliferation of codes that criminalize or otherwise proscribe speech on and off campus—even to the point of subrogating the protections of the First Amendment to the mandates of the political orthodoxies of prevailing majorities. *See, e.g.*, Melissa Weberman, *University Hate Speech and the Captive Audience Doctrine*, 36 OHIO N.U. L. REV. 553, 557 (2010) ("Not only is more speech actually detrimental to the marketplace of ideas when it comes to hate speech, but it also causes individual and group harms."); Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1, 24 (2005) (conceding that speech codes are almost impossible to craft consistent with the Constitution but "[n]evertheless" insisting that there is an obligation to combat "hate speech" on campus); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV.

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[2] *See also* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 390–92 (2009) (describing some recent examples of university harassment codes being used to punish clearly protected speech, such as one university's use of a harassment code to censure a student janitor for reading *Notre Dame vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan*, ostensibly on account of the book's cover art). For a longer treatment from the President of *amicus* FIRE, *see* GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012).

2320, 2321 (1989) ("In calling for legal sanctions for racist speech, this Article rejects an absolutist first amendment position."); Rhonda G. Hartman, *Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and Universities after* R.A.V. v. St. Paul, 19 J.C. & U.L. 343, 371 (1993) ("The law should not sacrifice the First Amendment rights of either vilifying speakers or their listeners unless the exercise of those rights infringes on the rights of others. At issue is the value-neutral question of whether sufficient evidence of harm exists. Unfortunately, First Amendment doctrine is not that simplistic."). And, of course, these sorts of anti-speech arguments eventually trickle down to affect the assumptions and expectations of students—sometimes in truly astonishing forms. *See, e.g.*, Sandra Y.L. Korn, *The Doctrine of Academic Freedom*, HARV. CRIMSON, http://t.co/STo20sUj27 (Feb. 18, 2014) ("If our university community opposes racism, sexism, and heterosexism, why should we put up with research that counters our goals simply in the name of 'academic freedom'?").

The biggest problem with these administrative efforts to restrict free expression is that they work. Students and faculty who otherwise would speak out on issues are forced to hold back for fear of punishment by the university. *See, e.g.*, Eugene Volokh, *A View from an Incoming Harvard 1L*, THE VOLOKH CONSPIRACY (May 1, 2010), http://www.volokh.com/2010/05/01/a-view-from-an-incoming-harvard-1l/ (posting an email from a rising first-year law student detailing how the administration's response to a speech controversy chilled constitutionally protected speech). And these

restrictions can and do target a wide and disparate spectrum of protected expression. *Compare Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 669–70 (1973) (*per curiam*) (allowing University of Missouri School of Journalism graduate student—who was expelled for violating university code of conduct prohibiting "indecent conduct or speech" after distributing an underground student newspaper on campus that contained, among other things, an article entitled "Motherf****r Acquitted" which discussed the acquittal of a member of the "radical" group "Up Against the Wall, Motherf****r"—to pursue declaratory and injunctive relief on the ground that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'") *with DeJohn*, 537 F.3d at 317–18 (affirming grant of injunctive relief to Army veteran pursuing a master's degree in military and American history at Temple University who claimed that school's anti-harassment code intimidated him into self-censoring his academic opinions on matters of military history and policy due to his fear that the school might conclude his views ran afoul of the code); *see also* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *University of Kansas: Anti-NRA Tweet Results in Professor's Suspension*, http://tinyurl.com/KUProfSuspension (last visited March 3, 2014) (discussing FIRE's opposition to University of Kansas' decision to place professor on administrative leave after he "posted a tweet to his personal Twitter account condemning the National Rifle Association in the wake of the September 16, 2013, shooting at the Washington Navy Yard, saying, 'Next time, let it be YOUR sons and daughters. Shame on you. May God damn

you.'"). Indeed, some colleges even publicly tout these chilling effects as an effective means of deterring undesirable but unquestionably protected speech. *See, e.g.*, Susan Kruth, *UCLA Report Suggests Chilling Speech Is the Answer to Offensive "Microaggressions,"* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Jan. 8, 2014), http://tinyurl.com/UCLA-Report (last visited March 3, 2014) (discussing a UCLA report that proposed using the threat of investigation as a tool to deter "unconsciously" "offensive" speech, known to some as "microaggressions").

C. The Sixth Circuit's Radical Restriction Of Pre-Enforcement Review Will Only Serve To Embolden Those Within Universities Who Seek To Further Restrict And Chill Student And Faculty Speech.

The chief means by which this Court can prevent "chilling" effects on student and faculty speech is to re-affirm that First Amendment plaintiffs are freely permitted to pursue pre-enforcement challenges to regulations proscribing *protected* speech. *Amicus* FIRE urges the Court to continue to provide First Amendment plaintiffs—including both petitioners and students and faculty at public colleges and universities—with the ability to challenge these chilling effects in a timely and effective manner. Although it goes without saying that these challenges must satisfy the standing and ripeness requirements of Article III, decisions like the one in this case ask much more; the Sixth Circuit's standard unduly and artificially hinders a given student- or teacher-plaintiff from obtaining judicial review of an encroachment on her First Amendment rights.

Here, the appellate court claimed that "[n]o sword of Damocles dangle[d] over SBA ... justify[ing] its fears [of prosecution]." Pet. App. 12a. The panel reached that conclusion notwithstanding respondent Driehaus' real efforts to enforce the prohibition on false political speech against SBA. *See* Br. for Pets. 3–4. And the court reasoned that SBA does not suggest that the Secretary has ever attempted to enforce the law against the type of speech it intends to make," and thus that any potential actions by Mr. Driehaus suffer from a "fatal" "degree of speculation." Pet. App. 13a–14a. Worst of all, the court relied on circuit precedent to foreclose SBA's ability to bring suit on the astonishing ground that it had not demonstrated an intention *to lie* in the future. Pet. App. 15a (SBA "would be closer to establishing ripeness if it had alleged that it intends to violate Ohio's false-statement law."). Missing the point entirely, the Sixth Circuit concluded that "SBA List's insistence [that it was telling the truth] makes the possibility of prosecution for uttering such statements exceedingly slim, particularly because SBA List can only be liable for making a statement 'knowing' it is false," *id.*, and that SBA had "no basis" for its fear of prosecution. *Id.*

As petitioners' brief demonstrates, all of this is plainly incorrect. Even worse, there is little doubt that these errors will infect other First Amendment contexts, because while the decision below involves political speech, the Sixth Circuit already has applied this erroneous threat-of-future-injury standard in the educational context. Applying a cramped threat-of-harm analysis to the case of a high school student, the Sixth Circuit concluded that the issue turned on the plaintiff's "choice to chill his own speech based on

his perception that he would be disciplined for speaking." *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008). The court observed that it could "only speculate" whether or not the plaintiff would have run afoul of the harassment code had he spoken. *Id.* Ultimately ruling in favor of the school, the Sixth Circuit claimed that the plaintiff's constitutional claim "trivializes the important business of the federal courts," because "[plaintiff] asks us, essentially, to find a justiciable injury *where his own subjective apprehension counseled him to choose caution* and where he assumed ... that were he to speak, punishment would result." *Id.* 610–61 (emphasis added).

As *Morrison* and the decision at issue in this case both demonstrate, the Sixth Circuit's rule requiring plaintiffs to allege an intention to violate the provision of law at issue not only is wrong as a doctrinal matter, it is particularly pernicious in the educational setting. At a school with an overbroad speech or harassment code, virtually no one actually *intends* to harass or be "hateful" in her speech, and that is not what the pre-enforcement review is about. The concern, instead, is that protected speech on important but sensitive issues will be *deemed* "harassing" or "hateful" under an impossibly vague harassment or speech code. *See DeJohn*, 537 F.3d at 317 ("Further, the policy's use of 'hostile,' 'offensive,' and 'gender-motivated' is, on its face, sufficiently broad and subjective that they 'could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone.'") (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.)). This is to say that the student at a school with a speech code does

not intend to violate the code but has no way of actually knowing whether or not she will be prosecuted; the student, understandably, will self-censor as a matter of prudence to avoid punishment.

The Sixth Circuit's approach is both an outlier and mistaken. This Court and the lower courts have made clear that plaintiffs are not required to risk punishment—whether by conceding their speech is "false," "harassing," "hateful," or otherwise proscribed—in order to assert a claim. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (explaining that, if otherwise, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser"); *see also Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) ("In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences."). Given these principles, the Sixth Circuit simply cannot be correct that every plaintiff must admit a violation of law in order to challenge the law on First Amendment grounds: after all, that bizarre prerequisite would defeat the entire purpose of the pre-enforcement challenge. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.") (emphasis in original); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that the

plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

Unlike the Sixth Circuit below, courts routinely recognize that the longstanding and accepted means by which plaintiffs are to seek to vindicate their First Amendment rights is through facial overbreadth challenges. As the *DeJohn* court observed, "since the inception of overbreadth jurisprudence, the Supreme Court has recognized its prominent role in preventing a 'chilling effect' on protected expression. This laudable goal is no less implicated on public university campuses throughout this country, where free speech is of critical importance because it is the lifeblood of academic freedom." *DeJohn*, 537 F.3d at 313–14; *see also id.* at 314 ("Because overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application, amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases."). This means of redress is particularly important for challenging overbroad university speech codes, which, like other First Amendment challenges, are exempted from the general constitutional rule favoring as-applied challenges. *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 258–59 (3d Cir. 2002).

The point of all this is that if a university scholar were required to admit to violating a speech code in order to challenge its constitutionality, then for all practical purposes that scholar would never be able to bring a facial overbreadth challenge with respect to that code—thus eradicating access to the core means by which academic freedom is protected. Indeed,

without the availability of pre-enforcement facial challenges, few, if any, students or faculty would *ever* admit to violating a campus speech or harassment code, rendering such codes immune from challenge and perpetually chilling protected student speech. And yet this is *precisely* what the Sixth Circuit's decision here will encourage—certainly in the university context. At bottom, it is hard to postulate a state of affairs more offensive to the continued vigor of First Amendment freedoms on our college campuses, and FIRE thus respectfully submits that the Court should reverse the appellate court's decision and make clear that there is no room in our country's classrooms for this sort of "pall of orthodoxy" to be cast down from above by university administrators. *Keyishian*, 385 U.S. at 603.

II. This Court Should Reject The Sixth Circuit's Extreme Test And Hold That Pre-Enforcement Challenges Under The First Amendment Need Only Meet Article III's Ripeness Requirements.

This case presents the Court with the opportunity to articulate the ripeness rule that controls for pre-enforcement challenges brought under the First Amendment. By holding that a pre-enforcement challenge is ripe for review when a statute arguably proscribes protected speech and the government cannot show that the statute has fallen out of use, this Court would provide the definitive framework under which all lower courts will analyze this issue going forward, which will serve to prevent those courts from straying down the erroneous path taken by the Sixth Circuit in this case and others.

The vast majority of courts and commentators have recognized that the threat of chilled speech

justifies a unique approach to ripeness in the First Amendment Context. Federal appellate courts outside the Sixth Circuit agree that the ripeness analysis is applied "most permissively" in this context. *See Harrell v. Florida Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010); *see also Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) ("Much like standing, ripeness requirements are also relaxed in First Amendment cases."); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) ("[W]hen a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements and recognized self-censorship as a harm that can be realized even without an actual prosecution.") (internal quotation marks and citations omitted); *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008) ("Our ripeness analysis is relaxed somewhat in the context of a First Amendment facial challenge ... because an unconstitutional law may chill free speech.") (internal quotation marks omitted); *Peachlum v. City of York, Pa.*, 333 F.3d 429, 434 (3d Cir. 2003) ("A First Amendment claim, particularly a facial challenge, is subject to a relaxed ripeness standard."); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) ("[I]n the First Amendment context, the ripeness doctrine is somewhat relaxed.") (citation omitted). And commentators in this area have similarly noted that the "First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss." *See, e.g.*, 13B Charles Alan Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3532.3 (3d ed. 1984).

Given the potential for "chilling" effects on speech, the majority of circuits have concluded that, in the First Amendment context, the existence of a statute that arguably restricts a plaintiff's speech is sufficient to give rise to a credible threat of prosecution—even absent any specific enforcement threats by the government. *See, e.g.*, *Stout*, 519 F.3d at 1118 (concluding that a credible threat of prosecution existed because, "[s]o long as the Canons remain in effect in their current form, the state is free to initiate such action against candidates"); *Peachlum*, 333 F.3d at 435 ("[I]n cases involving fundamental rights, even the remotest threat of prosecution, such as the absence of a promise not to prosecute, has supported a holding of ripeness where the issues in the case were predominantly legal and did not require additional factual development.") (internal quotation marks omitted); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) ("A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute.") (internal citations omitted); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) ("A finding of no credible threat of prosecution under a criminal statute requires a long institutional history of disuse, bordering on desuetude.") (citation omitted); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710–11 (4th Cir. 1999) (reasoning that a "non-moribund statute" presented a credible threat of prosecution even though the State had taken the litigation position that the alleged speech would not be statutorily proscribed).

Similarly, most circuits agree that a plaintiff's speech need only *arguably* violate the challenged statute to give rise to a credible and actionable fear of prosecution. *See Cooksey*, 721 F.3d at 238 (concluding that plaintiff faced a credible fear of prosecution because his complaint "describes speech that *could* fall under each of these categories" of prohibitions in the statute) (emphasis added); *Stout*, 519 F.3d at 1118 ("As previously discussed, the *arguable* vagueness of a statute greatly militates in favor of finding an otherwise premature controversy to be ripe.") (emphasis added; citation and internal quotation marks omitted); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) ("In the free speech context, such a fear of prosecution will only inure if the plaintiff's intended speech *arguably* falls within the statute's reach.") (emphasis added); *Majors*, 317 F.3d at 721 (explaining that a plaintiff faces a credible threat of prosecution when the statute "arguably" covers the plaintiff's conduct).

In marked contrast to the posture of these other circuits, the Sixth Circuit employs an extreme and untenable approach to the ripeness inquiry in pre-enforcement First Amendment cases. That court refuses to presume that a non-moribund statute poses a "credible threat" of prosecution; it instead demands that pre-enforcement First Amendment plaintiffs discharge the affirmative burden of showing that the government actually has previously "attempted to enforce the law against the type of speech it intends to make." Pet. App. 13a. Along these same lines, the Sixth Circuit requires plaintiffs to prove that their intended speech will certainly, not just arguably, violate the statute. Applying precisely this erroneous framework, the appellate court in this

case held that because petitioners refused to concede that they intended to make false statements in connection with an election, the possibility of prosecution was exceedingly small. Pet. App. 15a; *see also* Br. for Pets. 37 (citing additional Sixth Circuit cases adopting similar standard). And because the appellate court claimed that petitioners' only fear was that they would be subject to a "false" prosecution, that opened the door for the panel to conclude that the threat was insufficient to render petitioners' claims ripe.

This Court should put an end to the Sixth Circuit's continued adherence to this mistaken and outlier approach, and should hold that the majority rule already utilized by the other circuits is the proper standard for assessing whether pre-enforcement First Amendment claims are ripe. By formally announcing that the more permissive ripeness inquiry applies in the First Amendment context, this Court would be preserving core constitutional values of promoting the rule of law and protecting free speech, as well as simultaneously ensuring that the jurisdictional analysis remains distinct from the merits analysis.

In all events, articulating that non-moribund statutes pose a credible threat of prosecution to speech arguably falling within the statute's scope is to recognize the rule of law. *MedImmune*, 549 U.S. at 128–29; *Steffel*, 415 U.S. at 459. As the Ninth Circuit thus noted, requiring a party "to violate the [statute] as a precondition to bringing suit would [] turn respect for the law on its head." *Wolfson v. Brammer*, 616 F.3d 1045, 1061 (9th Cir. 2010) (internal quotation marks omitted). If a statute that arguably proscribes speech remains on the books, then law-

abiding citizens understandably will be hesitant to violate it. To suggest that citizens should make judgments about which laws to follow and which laws to ignore based upon the history of prosecutions is impossible to square with the normal operation of our system of government.

Just as it promotes respect for the rule of law, this standard provides critical protection for otherwise chilled speech—both in the public university setting and elsewhere. As the Third Circuit has recognized, "[o]ur stance toward pre-enforcement challenges stems from a concern that a person will merely comply with an illegitimate statute rather than be subjected to prosecution. Or, the government may choose never to put the law to the test by initiating a prosecution, while the presence of the statute on the books nonetheless chills constitutionally protected conduct." *Peachlum*, 333 F.3d at 435. And as the Eleventh Circuit explained: "Something will be gained, but much will be lost if we permit the contours of regulation to be hammered out case by case in a series of enforcement proceedings. ... While the 'hammering out' continues so do the vices of vagueness; the appellants' uncertainty about the reach of the ordinance will force them to continue to restrict their ... activities." *Harrell*, 608 F.3d at 1258 (quoting *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 822 (5th Cir. 1979)).

And finally, this standard would keep the ripeness inquiry separate from the merits. In reality, requiring—as the Sixth Circuit did below—that plaintiffs must prove that it is *certain* that their intended speech will violate the statute necessarily involves a merits-like determination that is misplaced at the jurisdictional stage. This problem is

particularly acute in the context of a vagueness challenge: After all, *the whole point* of such a challenge *is that the law is vague*; to require proof that a plaintiff's protected speech would certainly fall within the scope of the law thus seems indistinguishable from a decision on the merits.

Suffice it to say, public policy and the protection of core constitutional values favor pre-enforcement challenges involving speech in democratic elections and academic pursuits of knowledge. Indeed, it is these very values that often lead to court decisions quashing exercises of censorial power that violate the first principles undergirding our constitutional republic. Pre-enforcement review helps to vindicate these values and to avoid the inevitable chilling effect that results from the existence of laws prohibiting speech. In the end, it should go without saying that allowing laws violative of the Constitution to remain on the books undermines confidence in our legal system. Because that is precisely what the Sixth Circuit's decision does in this case, we respectfully urge the Court to reverse and allow petitioners to assert their First Amendment claims on the merits.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' briefs, the Sixth Circuit's judgment should be reversed.

Respectfully submitted,

GREG LUKIANOFF
WILLIAM CREELEY
FOUNDATION FOR
INDIVIDUAL RIGHTS IN
EDUCATION
601 Walnut Street
Suite 510
Philadelphia, PA 19106
(215) 717-3473

JEFFREY A. ROSEN, P.C.
Counsel of Record
JOHN K. CRISHAM
JENNIFER M. BANDY
MICHAEL A. FRAGOSO
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
jeff.rosen@kirkland.com

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST, *ET AL.*,
Petitioners,

v.

STEVEN DRIEHAUS, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, REVIEW AND HERALD PUBLISHING ASSOCIATION, AND PACIFIC PRESS PUBLISHING ASSOCIATION IN SUPPORT OF PETITIONERS

TODD R. MCFARLAND
Associate General Counsel
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321
mcfarlandt@gc.adventist.org

CHARLES M. KESTER
KESTER LAW FIRM
1160 North College Ave.
Fayetteville, AR 72703
(479) 582-4600
cmkester@nwark.com

GENE C. SCHAERR
Counsel of Record
LAW OFFICES OF GENE C. SCHAERR
332 Constitution Avenue NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTIONS PRESENTED

1. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would certainly and successfully prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

2. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are religious organizations that follow the "Great Commission," given by Jesus Christ to his followers, to go into all the world and "preach the Gospel." *See* Matthew 28:19-20; Mark 16:15. A principal method by which these organizations follow this evangelistic mandate is through door-to-door visits with potential converts during which church members share their testimonies, discuss religious issues, pray, distribute religious literature and solicit charitable contributions to sustain these missionary activities. These evangelistic efforts, traditionally known as "colporteur" ministries, have a long history in this country. *Amici* sponsor and support some of the nation's oldest and largest colporteur ministries. The Sixth Circuit decision under review here seriously threatens the viability of those ministries.

Amicus General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than eighteen million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than one million members. The General Conference sponsors several missionary programs in which church members travel to various locations to evangelize local residents through door-to-door solicitation.

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

One of these programs is a student missionary effort known as the "Literature Evangelist" program. These student missionaries regularly encounter local speech-suppressive laws which must be addressed through negotiation or litigation before these missionary activities may occur. A justiciability rule that would restrict challenges to these speech-suppressive laws would effectively foreclose pre-enforcement resolutions, and as a result would effectively eliminate this protected religious speech altogether.

Amici Review and Herald Publishing Association and Pacific Press Publishing Association are the only two publishing houses for the Seventh-day Adventist Church located within the United States. These publishing houses were established in 1849 and 1875, respectively. Both were established for the purpose of printing and distributing Adventist religious literature for use in evangelism and proselytizing, and publish the religious literature that is discussed throughout this brief. Since their founding, they have relied upon, supported and participated in the Adventist Church's Literature Evangelism ministry as an important channel for their publications.

For these reasons, *amici* are strongly interested in and concerned about the outcome of this case.

STATEMENT

Rather than summarizing the procedural history of this case, we present here a brief description of the religious speech that will likely be impacted as heavily by the Sixth Circuit's decision as the political speech at issue here.

Religious proselytizing through face-to-face meetings with potential converts, accompanied by

distribution of religious literature, has a history at least as old as that of this nation. As this Court has recognized, such missionaries have been a "potent force in various religious movements down through the years." *Murdock v. Pennsylvania,* 319 U.S. 105, 108 (1943). The same religious dissenters and nonconformists who fled England and the Act of Uniformity, 14 Car. 2 c. 4 (1662), and the Licensing of the Press Act, 14 Car. 2 c. 33 (1662), later proposed, debated and eventually approved the Bill of Rights, with its protections of religion and religious speech. U.S. Const., Amend. 1. The result has been a uniquely vibrant development and dissemination of religious views in this country. *See generally* Frank S. Mead & Samuel S. Hill, Handbook of Denominations in the United States (Abington Press 8th ed. 1987) (cataloguing more than 225 American denominations).

A. Missionary proselytization through door-to-door literature distribution and solicitation has a long tradition.

The missionary tradition predates the founding of our country by millennia, dating at least to the "Great Commission" given by Jesus Christ to his followers to go into all the world and "preach the Gospel." *See* Matthew 28:19-20; Mark 16:15. The specific form of evangelism involving the distribution of printed literature followed closely after Johannes Gutenberg's introduction of movable type for printing in the mid-fifteenth century. *Cf Murdock v. Pennsylvania,* 319 U.S. 105, 108 n. 6 (1943) (collecting examples of this method of evangelism).

In early nineteenth century America, "the organization of individual evangelical activity was [seen as] the universally recognized panacea for the ills and sins of the world." Elizabeth Twaddell, *The American*

Tract Society, 1814-1860, Church History, Vol. 15, No. 2 (Cambridge UP Jun. 1946) pp. 116-132, at p. 116 (available at http://www.jstor.org/stable/3160400) (last viewed on Feb. 27, 2014). As a result, numerous evangelistic associations began missionary activity through the distribution of religious literature. The American Tract Society was instituted in Boston for this purpose in 1814. In 1816, the American Bible Society was established in New York to distribute Bibles and study aids. *See* http://www.americanbible.org/about/history/ (last visited on Feb. 27, 2014). Both organizations have remained, and are still, active in the distribution of religious literature.

Organized in 1830, the Church of Jesus Christ of Latter-day Saints began missionary activities almost immediately thereafter. *See* Mead & Hill, Handbook of Denominations, at 134-141; http://historyofmormonism.com/mormon-history/ (last visited on Feb. 27, 2014). These missionary activities have long included the distribution of religious literature. *Cf* http://library.truman.edu/microforms/pamphlets_in_american_history.asp (last visited Feb. 27, 2014) (catalogue of pamphlets).

During the Civil War era, chaplains and others distributed Bibles and tracts as colporteurs. John William Jones, Christ in the Camp, or Religion in Lee's Army (1887) (available at http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0163) (last visited on Feb. 27, 2014).

At approximately this same time, the Seventh-day Adventist Church was recognized and began sponsoring colporteur ministries. *See* Mead & Hill, Handbook of Denominations, at 19-25. Early Adventist Church founder Ellen G. White called for "message-filled books, magazines, and tracts to be

scattered everywhere like the leaves of autumn." Ellen G. White, The Publishing Ministry (1983), at 5. Taking this counsel to heart, the Adventist Church continues to use several methods of missionary activity that involve the distribution of religious literature through face-to-face meetings and door-to-door canvassing. Review and Herald Publishing Association and Pacific Press Publishing Association began publishing religious outreach materials for the Seventh-day Adventist Church in 1849 and 1875, respectively, and these ministries have been active and continue to this day. *Cf. Murdock v. Pennsylvania*, 319 U.S. 105, 109 n. 7 (1943) (noting these missionary efforts).

Once known as "colporteur" ministries, these missionary activities are now known as "Literature Evangelism," and those who participate in them are referred to as "Literature Evangelists." This form of evangelism has been and remains a critical part of the ministry of the Adventist Church.

These ministries were joined in the 1870s by the denomination now known as Jehovah's Witnesses. *See* Mead & Hill, Handbook of Denominations, at 124–27. Jehovah's Witnesses have long focused upon distribution of the written word as part of their evangelistic mission, and almost immediately began distributing *Watchtower* magazine. *See, e.g.*, http://www.mostholyfaith.com/bible/Reprints/ (last visited Feb.. 27, 2014) (collection of back issues). Jehovah's Witnesses also sponsor active missionary efforts of this type. These missionaries are now known as "pioneers."

A similar organization arose in 1894, when American evangelist Dwight L. Moody founded the "Bible Institute Colportage Association" in Chicago to

distribute evangelical Protestant religious tracts and books. Now known as Moody Publishers, it continues to publish and distribute religious materials. http://moodycollective.com/about-moody-collective/ (last visited on Feb. 27, 2014).

As these examples show, American religious groups have a long history of seeking converts though personal appeals coupled with distribution of religious literature. This practice, which is at the heart of the speech protected by the First Amendment, has long been integral to the vitality of American religious life.

B. *Amici's* missionaries are regularly engaged in this traditional religious speech.

Amici have long been involved in this traditional form of missionary activity. And the Adventist Church's experience with its student missionary programs is particularly relevant, not only to the Adventist Church, but to any religious or for that matter non-religious organization doing door-to-door advocacy.

The Adventist Church's program is designed not only to place literature in the home, but also to offer a range of religious services, all designed to promote the Adventist Church's evangelistic message. Students also routinely pray with willing homeowners, offer personal religious testimonies and perform religious counseling.

Another integral feature of these missionary programs is the solicitation of donations to support the program and the Christian education of the student missionaries. Student missionaries are trained to explain that the literature is offered on a purely voluntary donation basis. They suggest a donation

range for any books in which a homeowner might be interested, and describe the manner in which donations are used. This description includes a statement that a portion of any donation will be used for the student missionary's Christian education.

Although money may be involved (if a donation is received), literature is not sold by the missionaries. Missionaries routinely give literature to interested homeowners who do not want or are unable to make a donation. Missionaries are trained to attempt to leave some material, even if only a pamphlet, at every house where someone is willing to accept it. Missionaries also receive donations from persons who do not want any literature but just want to help. A typical donation ranges from $10 to $20, although donations above and below the suggested range frequently occur.

Donations are solicited for reasons beyond the obvious need to support the program and increase its outreach. For example, the Church has learned over the years that people are more likely to read what they value. A book that is simply "forced upon" a person is less likely to be valued than one accompanied by a voluntary financial gift. A contemporaneous donation often creates value for the book in the recipient's mind, and therefore makes it more likely to be read. In addition, a voluntary donation often creates an allegiance or an affinity between the donor and the cause that the donation supports. As a result, the simple act of making a donation is frequently the first step in the conversion of the donor.

In short, *amici's* missionary programs are paradigmatic examples of religious speech in the long tradition of "colporteur" ministries in which evangelists go door-to-door distributing literature and soliciting potential converts.

C. Religious speech by door-to-door missionaries has long been recognized to be at the core of First Amendment protection.

This Court recognized the significance of these ministries almost three quarters of a century ago, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943):

> The hand distribution of religious tracts is an age-old form of missionary evangelism . . . [and] has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thou-sands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting."

Id. at 108–09. While the name of this ministry may have changed—"colporteurs" are now identified by terms such as missionaries or evangelists—the nature of the speech, and the need to protect that speech, remain the same.

This Court revisited the issue of door-to-door religious ministries in *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002), which made clear that door-to-door witnessing could not be subjected to municipal licensing restrictions. In reaching this decision, the Court noted that some of the Court's "early cases" which invalidated such speech-restrictive laws "also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved." 536 U.S. at 162. However, after this remark

and a review of *Murdock* and similar cases, the Court made the following definitive statement:

> The rhetoric used in the World War II-era opinions that repeatedly saved [missionaries] from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today."

536 U.S. at 169. *Village of Stratton* thus reaffirmed the principle recognized in *Murdock*, namely, that door-to-door canvassing and distributing religious literature is protected First Amendment activity, even if money is involved.[2] Indeed, it is difficult to imagine a more ringing endorsement of the "value judgment" embodied in *Murdock* than this statement in *Village of Stratton*.

D. Door-to-door missionaries frequently encounter local laws that suppress this protected religious speech.

Unfortunately, many localities throughout the country have failed to heed the "value judgment"

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[2] This latter aspect of *Murdock* was not at issue in *Village of Stratton*, as it had been previously reaffirmed by the Court. *See Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) ("charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes" and is fully protected speech) (*quoting Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)); *accord Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988) (charitable solicitation protected speech).

embodied in *Murdock* and *Village of Stratton*. Indeed, many municipalities have interpreted the Court's observation in *Village of Stratton* that "a town may have [interests] in some form of regulation, particularly when the solicitation of money is involved," 536 U.S. at 162, 164–65, as *carte blanche* authority to apply their local licensing ordinances to all door-to-door missionary activities. These cities also require permits, frequently with an onerous application process, and permit fees—sometimes running into thousands of dollars—before student missionaries may engage in this protected speech. These cities also enforce these ordinances against *amici's* missionaries through criminal prosecutions. Such ordinances therefore impose significant burdens upon *amici's* ability to exercise their core First Amendment right of religious speech.

Even putting aside the "money" question arguably left open in *Village of Stratton*, these ordinances are often blatantly unconstitutional prior restraints under existing precedents of this Court.[3] They also suffer from numerous other constitutional infirmities. For example, such ordinances often:

- exempt certain speakers, viewpoints and/or messages, creating content and viewpoint discrimination, *Larson v. Valente*, 456 U.S. 228, 246-47 (1982); *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n of New York*, 447 U.S. 530, 537 (1980); *Police Dept. of*

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[3] A prior restraint exists when public officials exercise "the power to deny use of a forum in advance of actual expression." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975); *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968).

City of Chicago v. Mosley, 408 U.S. 92, 97-99 (1972);

- vest the issuing authority with unfettered discretion to grant or deny the permit, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 133 n.10 (1992); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757–58 (1988);
- sweep too broadly, are not narrowly drawn, and are not the only reasonable alternative which has the least impact on First Amendment freedoms, *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559–60 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965);
- fail to include required procedural safeguards to reduce the danger of prohibiting constitutionally protected speech, *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559–60 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58 –59 (1965);
- contain no time frame in which the permit must be granted or denied, *FW/PBS v. City of Dallas*, 493 U.S. 215, 227–29 (1990);
- impose non-nominal license fees, *Murdock*, 319 U.S. at 113-15;
- require applicants to provide a litany of personal information (including social security numbers in violation of the Privacy Act, Pub. L. 93-579, § 7, *set out as note to* 5 U.S.C. § 552a), as well as detailed information regarding the sponsoring organization, *Village of Stratton*, 536 U.S. at 166–67; *Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 198-99 (1999); *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334,

341-45 (1995); *Talley v. California*, 362 U.S. 60, 63–64 (1960); *Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000);

- allow the issuing authority to ask for any other information she may deem necessary, which (1) repeats the informational burden and (2) introduces additional discretion, *see* cases cited on these two points, *supra*;
- inquire regarding criminal histories and restrict the issuance of licenses to persons with prior convictions, *Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000); *Genusa v. City of Peoria*, 619 F.2d 1203, 1218, 1219 n. 40 (7th Cir. 1980); and
- are impermissibly vague, *Marks v. United States*, 430 U.S. 188, 196 (1977).; *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976).

In short, while these ordinances are as diverse as the municipalities that pass them, such ordinances are arguably the area of law most frequently in violation of the First Amendment.

These ordinances fall into three general categories. Occasionally they ban all door-to-door activity—which has long been recognized as unconstitutional. *See Martin v. City of Struthers*, 319 U.S. 141, 146-147 (1943). Many more municipalities attempt to regulate door-to-door activity any time money is involved—both when sales are made and when donations are solicited. At least as frequently, a city will regulate only sales, and will exclude charitable solicitation. Under these latter ordinances, the Church's missionary work should be exempt from regulation. However, some cities take the position that because of the

contemporaneous nature of the two transactions (distribution of literature and solicitation of a donation), the missionary activities are subject to the ordinance even though the language of the ordinance does not support such a broad interpretation.

E. *Amici's* efforts to minimize conflicts between these ordinances and its missionary activities depend upon pre-enforcement negotiations.

Under *amici's* missionary programs, hundreds of college age students and other church members blanket the country each year, visiting hundreds of locales. Each missionary knocks on hundreds, if not thousands of doors, creating the potential for hundreds of thousands of confrontations and conflicts.

Amici are aware, through long experience, of the potential for conflicts, and have actively worked to avoid them. For example, before *amici's* missionaries visit a particular locale, local authorities are informed of the nature of the program and the missionaries' upcoming activities. These efforts are largely successful. Often there is no further communication and these missionary visits are both productive and uneventful. However, each year a significant number of localities attempt to enforce various speech-suppressive ordinances, such as business or solicitation licensing ordinances, against *amici* and their missionaries.

The attempted enforcement of these speech-suppressive ordinances consistently follows one of two patterns. Sometimes local authorities will respond to the program leader's overtures by asserting that the missionaries' activities are subject to regulation under a local ordinance before the missionaries arrive. Often

a city clerk, police administrator, or similar official will provide the city's interpretation of the ordinance and flatly state that it will be enforced against the student missionaries, who will be subject to prosecution if they engage in missionary work in that jurisdiction. These are the most obvious cases in which pre-enforcement negotiation or litigation occurs.

Other times, *amici's* overtures are ignored, the missionaries commence their efforts, and the locality's view becomes evident only when one or more missionaries is stopped or arrested by local police. Such encounters often result in criminal prosecutions under speech-suppressive ordinances that are plainly unconstitutional. Over the past two annual cycles, *amici's* missionaries have been criminally prosecuted under such ordinances in at least a half dozen states, including Alabama, Georgia, Louisiana, New Jersey, Oklahoma, Tennessee, and Texas. Although the issues are obviously different once an arrest has occurred (*e.g.*, *Younger* abstention), these cases have also traditionally been subject to negotiation or litigation that avoids further arrests or prosecutions.

Once the Church becomes aware that the city is threatening to or is enforcing a speech-suppressive ordinance against the missionaries, all its missionary teams are forced to move on to a different community until the issue can be resolved, or else all the missionaries risk individual criminal prosecutions for violating the ordinance. Because a significant number of the missionaries are minors and young adults, the Church simply cannot risk arrest. The Church is acutely aware of the collateral consequences of an arrest or criminal prosecution for these missionaries, even if the charge is eventually dropped or the

missionary is acquitted. In addition to being traumatizing to the students and disruptive to the program, such arrests commonly must be disclosed in college, graduate and law school applications. They are also routinely the subject of inquiry on job applications, background checks, professional licensing reviews (such as for lawyers, accountants and engineers), and immigration and citizenship applications.

The collateral consequences for missionaries who are criminally prosecuted is one of the reasons the Adventist Church has implemented a vigorous program of notice to localities, followed by negotiation and, where necessary, litigation. To be effective, however, all of these efforts must occur pre-enforcement: Once enforcement commences, there is no longer any realistic possibility of civil litigation to test the city's interpretation of its ordinance, or to test the constitutionality of the ordinance or its interpretation, and therefore no realistic possibility of hesitation.

SUMMARY OF ARGUMENT

Although this case involves political speech, the standing rules established here will have a dramatic effect not only upon the political speech of entities like the Petitioners who wish to erect political billboards, but also upon the time-honored religious speech of legions of humble missionaries from a wide variety of religious sects and denominations. Although the First Amendment's protection of missionaries who distribute literature and solicit potential converts door-to-door has been clearly established since a series of World War II era decisions by this Court, this right to religious speech remains under constant threat.

As explained above, for example, *amici's* missionaries frequently encounter local laws that suppress their protected religious speech under the guise of regulating and licensing peddlers, hawkers, solicitors, canvassers and the like. And *amici's* missionaries have been subjected to criminal prosecutions in at least a half a dozen states over just the past two years.

Unfortunately, the Sixth Circuit's justiciability standard will significantly hinder any pre-enforcement negotiations and education undertaken by religious bodies seeking to engage in door-to-door missionary activities: That standard will remove any incentive a city would otherwise have to negotiate an advance resolution. And this will dramatically chill protected religious speech. Faced with a threat of prosecution, missionaries such as those deployed by the *amici* will be forced either to self-censor or to engage in protracted litigation. Neither alternative serves the purpose of Article III standing requirements. In fact, both alternatives erode long-established First Amendment protections, and increase the likelihood of protracted litigation without any countervailing benefit. As a result, *amici* urge that the Court reject the Sixth Circuit's overly restrictive standing test.

ARGUMENT

The Sixth Circuit's overly restrictive justiciability standards will dramatically chill not just political speech, but protected religious speech as well.

This Court's First Amendment case law has long made clear that religious speech in the form of door-to-door missionary activity—including personal witnessing, distributing religious literature, and

soliciting support—is at the core of protected First Amendment activity. *E.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002). By impeding the ability of religious sponsors of such activity to engage in effective pre-enforcement negotiations with municipalities over the application of solicitation ordinances to that protected activity, the Sixth Circuit's decision will seriously erode that First Amendment protection. Two aspects of that decision are particularly troubling: (a) the requirement of a pending prosecution, and (b) the "false prosecution" doctrine.

A. The Sixth Circuit's requirement of a pending prosecution eliminates the pre-enforcement standing that is necessary to protect religious speech.

The test for standing to assert a pre-enforcement challenge to a speech-suppressive law has been settled for years. A speaker merely must face a "credible threat of prosecution" to maintain a pre-enforcement challenge on First Amendment grounds. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Here, however, the Sixth Circuit adopted a novel and overly restrictive test for what constitutes a credible threat of enforcement of a speech-suppressive law. The Sixth Circuit described the standard as "an imminent threat of future prosecution." Pet. App. 8a–10a. Under this standard, the Sixth Circuit reasoned that a finding of probable cause that Petitioner SBA List's speech violated the challenged law did "not help [Petitioner SBA List] show an imminent threat of *future* prosecution" because it was not a "final adjudication" of liability. Pet. App. 12a (emphasis in

original). The Sixth Circuit also denied standing because SBA List could not identify a specific person who would complain so as to initiate proceedings if SBA List engaged in the protected speech at issue by erecting a future billboard. Pet. App. 12a–14a.

Both of these holdings are extremely disturbing to *amici*. The conclusion that a finding of probable cause does "not help" to demonstrate standing is difficult to comprehend. If applied to *amici's* missionary programs, this heightened standing requirement would sound their death knell. In this case, a finding of probable cause was made regarding the actions of Petitioner SBA List, yet this finding was insufficient to support SBA List's standing to challenge the statute when SBA List intended to repeat the very same activity that had resulted in the probable cause determination. By contrast, as the Sixth Circuit properly observed, Petitioner COAST's standing was more attenuated because the probable cause finding was made against a different entity. Pet. App. 18a.

To apply the Sixth Circuit's reasoning to *amici's* missionary programs, it would be as if a student missionary who is given a citation for violating an ordinance by knocking on the door of the first house on a block lacks standing to challenge the application of that same ordinance to her intended action of knocking on the second door on the block—until she actually knocks on that door and receives a second citation. The same holds true with each successive door on the block. The Sixth Circuit's insistence upon viewing each instance in isolation is simply illogical and has no support in the law.

Additionally, to have standing under the Sixth Circuit's view, a plaintiff must already be under prosecution for violating the challenged law. Pet. App.

17a. Ironically, under this reasoning, any challenge that would be ripe for review would also be subject to abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

In *amici's* experience, if one member of a missionary team is prosecuted under an unconstitutional ordinance, one typical response would be for other members of that missionary team to file suit to enjoin enforcement of the ordinance. However, these other team members, despite all their preparation and despite their presence in the locality, have not themselves been directly threatened with prosecution, so their claims are even more attenuated than those of the missionary who was prosecuted. The claims of these other missionaries are essentially on par with the claims by Petitioner COAST. Thus if the missionary who is prosecuted (the equivalent of SBA List) lacks standing to challenge enforcement of the ordinance, a similar result follows inexorably for these other missionaries, who are more akin to COAST.

The Sixth Circuit decision creates yet another unjustified impediment to pre-enforcement standing: a requirement that a person challenging an unconstitutional law must identify the complainant that will cause enforcement to begin. Pet. App. 17a. Of course, until that enforcement is begun, there is almost by definition no way to know who will commence it. For example, even though *amici's* missionaries may receive responses to their initial overtures indicating that the city will enforce its ordinance through prosecution, and it is a certainty that such prosecutions will occur, there is no way to know ahead of time which citizen will file a complaint, or which police officer will issue the citation that begins the first prosecution.

The ultimate result of the Sixth Circuit's reasoning is that between the new standing limitations it has created and traditional *Younger* abstention, no challenge to an unconstitutional speech-suppressive law is possible until *after* enforcement proceedings have concluded.

The Sixth Circuit's new standing requirements thus mean that pre-enforcement standing is a dead letter, and create a Hobson's choice for *amici's* missionaries. Given the practical realities of a travelling missionary program, the absence of a method to oppose a city's clear intent to enforce an unconstitutional ordinance means that missionaries must either self-censor by leaving the city entirely, or actually subject themselves to criminal prosecution in order assert their First Amendment rights. The practical result of this dilemma is that jurisdictions that enact such speech-restrictive ordinances will effectively insulate themselves from the religious speech that is at the core of First Amendment values.

Unless *amici's* missionaries self-censor by avoiding the city entirely, the alternative is a series of criminal prosecutions of the offending missionaries, followed by a series of lawsuits seeking damages under 42 U.S.C. § 1983 after the unconstitutional charges are dismissed or the missionaries are acquitted. The traditional standing inquiry avoids such a Hobson's choice, since the City's credible pre-enforcement threat to enforce its ordinance permits resolution of the dispute before multiple criminal proceedings are actually initiated.

B. The Sixth Circuit's "false prosecution" doctrine further impedes the pre-enforcement standing that is necessary to protect religious speech.

The second troubling aspect of the Sixth Circuit's standing test is that it grafts a new and unjustified requirement onto the traditional standing inquiry. In what it referred to as a "false prosecution doctrine," the Sixth Circuit reasoned that as long as a speaker claimed to have a valid defense to the prosecution, the charges were "false" and a "false prosecution" would not support standing. Pet. App. 15a. The Sixth Circuit required that, to have standing to raise a First Amendment challenge to an unconstitutional law, the challenging party must abjure other potential defenses and essentially admit a violation of the law. The Sixth Circuit's approach thus requires that, merely in order to be heard, a party wishing to assert a First Amendment claim must make factual allegations that are believed by the challenging party to be false.

1. This is particularly troubling to *amici* because the laws with which their missionaries are typically threatened (*i.e.*, ordinances that are applicable only to sales) are subject to at least two defenses: (1) that the ordinance does not apply to *amici's* missionaries; and (2) that if the ordinance is applied to *amici's* missionaries, the ordinance is unconstitutional. The Sixth Circuit's "false prosecution" doctrine effectively forecloses any pre-enforcement challenge to even the most clearly unconstitutional law unless the affected parties affirmatively plead facts they believe to be false. For example, *amici* and their student missionaries would be required to plead that they were

selling books—rather than merely receiving voluntary donations—a fact they believe to be false.

This new "false prosecution" doctrine turns normal pleading requirements on their head. The more strained a city's interpretation of its ordinance is, the more likely the plaintiff is to prevail on the merits. At the same time, the more strained a city's interpretation of its ordinance is, the more difficult it becomes for the affected speaker to plead standing for a First Amendment challenge. That is because Rule 11 requires that, by signing a complaint or other pleading, the signing party (whether a party or a party's attorney) certifies that the factual allegations contained in the pleading are supported by evidence. Fed. R. Civ. P. 11(b)(3). Equally important, this new pleading requirement requires litigants (and their counsel) to violate the Ninth Commandment, which prohibits "false witness." Exodus 20:16, Deuteronomy 5:20.

While it has long been true that statutes and ordinances should be interpreted to avoid constitutional difficulties where possible, *see Frisby v. Schultz*, 487 U.S. 474, 483 (1988), the Sixth Circuit's novel approach dramatically expands this principle, transforming it from its traditional role in resolving the merits of a case into a precondition for a party to be heard. Under that approach, merely to initiate a challenge to a speech-restrictive law under which a speaker has been threatened with prosecution, that speaker must effectively (and falsely) concede the merits of the threatened charge. And where courts might previously have decided a case on the merits by limiting the scope of a challenged ordinance (in order to avoid a constitutional issue), the Sixth Circuit's standing rule changes this from a rule of decision to a

rule of standing. This is an important transformation because, as a rule of decision, a limiting construction of a challenged ordinance permits the speech at issue to occur. However, as a rule of standing, it has the opposite effect—the speaker cannot have her challenge heard on the merits, and the chilling effect of the challenged ordinance continues.

2. As previously explained, *amici* consistently seek to engage local officials in a discussion designed to reach an accommodation that allows a locality to protect its legitimate interests, while at the same time preserving the First Amendment rights of their missionaries. However, cities are often reluctant to examine or even discuss these ordinances, viewing them as popular with the electorate despite any constitutional defects. It is typically only after the specific constitutional defects of the ordinances are explained in detail by counsel for the Church to the city attorney or municipal prosecutor that the parties are able to work out an agreement. Under these agreements, the parties essentially settle a hypothetical 42 U.S.C. § 1983 lawsuit before it is filed. Years of experience have demonstrated to the Church that a credible threat of litigation is almost always required to reach such a negotiated resolution. Absent such a threat, municipalities simply have no incentive to negotiate.

By erecting these two new standing requirements, the Sixth Circuit has eliminated any credible threat of pre-enforcement litigation. While at first glance this might seem to reduce litigation, it actually has the opposite effect. The Sixth Circuit's new standing rules have the perverse effect of encouraging more litigation by limiting the pre-enforcement standing that is a precondition for pre-enforcement negotiation. Instead

of such negotiations (or the occasional single lawsuit to enjoin the enforcement of an unconstitutional speech-suppressive ordinance), the restriction upon pre-enforcement standing will force *amici* either to self-censor to avoid threatened prosecutions, or to litigate these constitutional issues in a protracted series of criminal prosecutions and subsequent Section 1983 damages cases.

Such a standing rule undermines First Amendment rights and makes no sense as a matter of judicial administration. It should be rejected.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reject the Sixth Circuit's aberrant and unduly restrictive limitations of standing, and to reaffirm the longstanding principle that permits standing for pre-enforcement challenges to speech-suppressive laws without the additional limitations imposed by the Sixth Circuit.

Respectfully submitted,

TODD R. MCFARLAND
Associate General Counsel
GENERAL CONFERENCE
OF SEVENTH-DAY
ADVENTISTS
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321
mcfarlandt@gc.adventist.org

CHARLES M. KESTER
KESTER LAW FIRM
1160 North College Ave.
Fayetteville, AR 72703
(479) 582-4600
cmkester@nwark.com

GENE C. SCHAERR
Counsel of Record
LAW OFFICES OF
GENE C. SCHAERR
332 Constitution Avenue NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,
Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, and JON HUSTED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE GOVERNMENT INTEGRITY FUND IN SUPPORT OF PETITIONERS

WILLIAM M. TODD
Counsel of Record
137 East State St.
Columbus, Ohio 43215
(614) 545-6311
wtodd@williammtodd.com

Counsel for Amicus Curiae The Government Integrity Fund

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

The Government Integrity Fund believes that our state and nation need leaders who support policies designed to foster economic growth and opportunity; limit the size and scope of government; and promote individual freedom and responsibility. Too often, those elected to govern do not understand how these three elements of a free society work together to result in economic progress and prosperity. Integral to these three elements is a free and open political debate. An educated and informed electorate begins with freedom of speech and the right to petition for redress of grievances. The unrestrained power of individual freedom is the catalyst for innovation and economic growth.

SUMMARY OF ARGUMENT

The ultimate arbiters of political speech should be the voters. The challenge of providing objective political fact-checking is inherently complicated by the interpretative nature of political speech. These challenges are a continual source of debate and criticism not only by political parties and their candidates, but among journalists themselves. The partisan government Commission responsible for adjudicating the Ohio law not only suppresses political speech through threat of criminal prosecution, but

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[1] Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover and his associate participated in authoring this brief. No entity other than the Government Integrity Fund provided financial support for this brief. The consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

stands as a wall between voters and their would-be representatives.

ARGUMENT

I. FACT-CHECKING POLITICAL SPEECH IS INHERENTLY A POLITICAL INQUIRY

A. A State Commission Cannot be a Neutral Political Fact Checker

The "discovery and spread of political truth" among the voters requires the freedom to "think as you will and speak as you think." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring). Voters are the final arbiters in the democratic process. Whether a candidate be honest, or otherwise, the voters make the choice of who will best serve as their representatives. A partisan, state body that attempts to distinguish political truth from lie robs the electorate of their fundamental right to choose.

Ohio's criminalization of political speech begins with a complaint and hearing process overseen by the Ohio Election Commission ("the Commission"). The seven members of the Commission are appointed by elected officials to determine what is and what is not a false statement about political candidates or their records. Ohio Rev. Code §§ 3517.21(B)(9-10); 3517.992(V). Ohio makes the Commission the gatekeeper of what the voters should or should not know, and it becomes the arbiter of political truth at the most critical points before an election. In effect, the Ohio law circumvents the democratic process.

B. Fact-Checking Political Speech is Quintessentially A Matter of Opinion

The political issues subject to the Commission's fact-checking are as limitless as those before their media counterparts. Political journalism is, by its very nature, a process of fact finding, checking and interpretation. A subset of political journalists has evolved a "specialty" focused wholly on judging the objective truth of political statements. These fact-checkers have emerged as self-appointed final authorities on what is "objectively" true and what is "political spin."

1. *A.P. Fact-checking Sarah Palin's Ambitions*

Personal motivations are inherently subjective and hardly reducible to the neutral determinations of fact checkers. A good example is the Associated Press putting eleven reporters to work fact-checking Sarah Palin's campaign memoir, *Going Rogue*.[2] In this instance the AP fact-checkers highlighted Palin's assertion that her motivations were rooted in a "purpose", rather than in ambition. The AP fact-checkers determined that her statements were less than truthful. The AP concluded that "few politicians own up to wanting high office for the power and prestige."[3]

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[2] Greg Marx, "Straying from the Facts: AP's fact check of Palin reaches too far"(Nov.17,2009,1:33PM), http://www.cjr.org/campaign_ desk/ straying_from_the_facts.php?page=all, *reviewing* Sarah Palin, GOING ROGUE: AN AMERICAN LIFE (HarperCollins; 1st edition, 2009).

[3] *Id.*

The allocation of resources required for the thoroughness of the AP investigation led other fact-checkers to conclude that the AP article was "as much a matter of interpretation and analysis as factual accuracy."[4] Respectfully, your *amicus* submits that this example underscores the inherent challenges facing fact-checkers who attempt to make objective determinations of truth or falsity out of statements open to many interpretations.

2. *President Obama and Government Funded Abortions*

In 2009, President Obama responded to criticism that health care reform legislation would provide government funded abortions as "not true" and called such charges "fabrications."[5] Douglas Johnson, legislative director for the National Right to Life Committee, disagreed, charging that President Obama's statements "brazenly misrepresented"[6] the abortion funding in the health care reform bill. *FactCheck.org* stepped in to decide "which side [was] fabricating."

FactCheck.org concluded that the President's characterization of the criticism as "fabrications" went

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[4] *Id.*

[5] FactCheck.org, "Abortion: Which Side is Fabricating: Despite what Obama said, the House Bill would allow abortions to be covered by a federal plan and by federally subsidized private plans.", http://www.factcheck.org/2009/08/abortion-which-side-is-fabricating/ (last visited February 28, 2014).

[6] *Id.*

too far.[7] Its analysis indicated that the health care legislation provided two options under which a woman could receive an abortion. A federal plan and federal subsidies for private plans. However, it further concluded that the bill did not require Congress to appropriate federal money for abortion coverage. Seizing on the word "fabrication", *FactCheck* effectively concluded that the President was not lying, but not wholly truthful.[8] Your *amicus* submits that such interpretations are at the very core of fact-checking.

3. *Mitt Romney's "Binders of Women"*

During the second Presidential debate in 2012, Mitt Romney claimed to have actively recruited women for his staff during his tenure as Governor of Massachusetts. Governor Romney stated that he sought input from women's groups that resulted in "binders full of women" who were qualified for positions in his administration.[9] Fact-checkers at CBS News questioned whether the binders were the result of a Romney initiative or a concerted advocacy effort on the part of women's groups.[10]

CBS' fact-checkers determined that Romney's suggestion that the number of woman in his

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[7] *Id.*

[8] *Id.*

[9] Lucy Madison, "Fact-Checking Romney's 'binders full of women' claim (Oct. 18, 2012, 10:27AM), http://www.cbsnews.com/news/fact-checking-romneys-binders-full-of-women-claim/.

[10] *Id.*

administration was due to his staff's recruitment efforts was misleading. As evidence, CBS fact-checkers cited to statements by women's advocacy groups that argued that they approached both parties prior to the 2002 election. Romney campaign staffers disagreed, stating that they had engaged in an independent recruitment process which yielded the majority of woman who served in the administration.

CBS interpreted Romney's statements to mean that "he organically noticed a dearth of women applicants" as the basis for his recruitment push. Its conclusion that the statement was "misleading" rests on CBS' interpretation of Romney's initial statement, rather than a reasoned evaluation of the two camps' statements.

C. The Interpretive Problems Facing Fact-Checkers are Widely Acknowledged

Whether it be the "Truth-o-Meter" of *PolitiFact* or the "Pinocchios" of the *Washington Post's* "The Fact Checker," providing metrics that allow the public to scrutinize public figures has become an inescapable feature of the political landscape. These animated caricatures provide a convenient rubric to help the public distinguish political truth from lie. However, these fact-checking organizations, and their cartoon devices, have come under criticism.

Recently, *Politico*, a politics-centric news outlet, surveyed various fact-checkers. *Politico* analyzed metrics and outcomes to conclude that methods and interpretations hinder effective fact-checking. Additionally, while formally nonpartisan, fact checkers continue to have an up and down relationship with

partisan factions "depend[ing on] whose pants are adjudged to be on fire any given day."[11]

Politico's survey revealed inconsistencies resulting from both methodology and the inherent challenges of fact-checking subjective statements. *PolitiFact,* for example, takes a categorical approach to fact-checking which results in "statements that are literally true getting ratings other than 'true.'"[12] *Politico* observed that "Alabama Republican Dale Peterson's technically truthful statement that he 'was in the Marine Corps during the Vietnam War' was rated 'mostly false' because he hadn't served in Vietnam."[13]

The credibility of political fact-checking is truly undermined when it "purports to resolve subjective disputes of political opinion under the guise of objective expertise."[14] Glenn Greenwald observed in a *Salon* article that cited to *PolitiFact's* reliance on "supposedly neutral, ideology-free 'expert[s]'" as the basis for their

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[11] Ben Smith, "The facts about the fact checkers", POLITICO (Nov. 1, 2011, 10:51AM) *available* at http://www.politico.com/news/stories/1011/67175.html.

[12] *Id.*

[13] *Id.*

[14] Glen Greenwald, "*PoltiFact* and the Scam of Neutral Expertise: Many Deeply Biased 'National Security Experts' are Absurdly Treated as Objective and Ideology-Free", SALON (Dec 5, 2011, 9:27AM), at http://www.salon.com/2011/12/05/*Politico*_and_the_scam_of_neutral_expertise/.

criticism of Ron's Paul's stance on the a 2011 defense authorization bill.[15]

Greenwald's objections are not unique. Mark Hemingway of the *Weekly Standard* criticized the "veneer of objectivity"[16] under which fact checkers operate. Hemingway cautioned that "the fact checker is less often a referee than a fan with a rooting interest in the outcome."[17]

Amicus respectfully submits that while partisan motivations may color fact-checkers' analytical lenses, there is a more fundamental problem facing fact-checkers across the political spectrum. Not all political statements are subject to a black-and-white determination. When fact-checkers channel their conclusions into categorical determinations, the context of underlying statements gets lost.

II. Nothing in Ohio Law Prohibits Anyone from Filing a Complaint Against a Fact-Checking Organization

Your *amicus* submits that the questionable accuracy of fact-checking organizations places their political analysis at the mercy of the Commission. Ohio political candidates can, and have, used the Commission to deter and suppress speech critical to the voters' understanding of the issues. The Commission is not only a forum for prosecuting candidates, political

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[15] *Id.*

[16] *Id.*

[17] *Id.*

parties and advocacy groups. Fact-checkers and the media are also subject to the Commission's process. In the 2012 Ohio Senate race between State Treasurer Josh Mandel and Senator Sherrod Brown a political back-and-forth between the candidates earned Mandel a "pants-on-fire" from *PolitiFact*.[18] *PolitiFact* analyzed Mandel's criticism of Brown's stance on "fracking" as siding with "Washington bureaucrats and fringe extremists."

In order to run the accusation down, *PolitiFact* analyzed the term "fringe extremist." To characterize a position as "fringe" or "extreme" necessarily implies an understanding as to what is considered mainstream. It should not come as a surprise that, when interviewed by *PolitiFact*, the three Ohio officials Mandel referenced "did not consider [themselves] to be fringe-like."

Ohio law criminalizes "false statements" made regarding a candidate's record. Under Ohio law, Mandel could bring *PolitiFact* before the Commission to determine what constitutes a "fringe extremist", and to defend its assessment that his characterization was a lie.[19]

A complaint under the Ohio law may be filed by "any person" who believes that the political speech of

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[18] PolitiFact.com, "Josh Mandel says Sherrod Brown has sided with Washington bureaucrats and fringe extremists on fracking.", (Dec 7, 2011, 6:00AM), http://www.politifact.com/ohio/statements/2011/dec/07/josh-mandel/josh-mandel-says-sherrod-brown-has-sided-washingto/

[19] *Id.*

another is false. Ohio Rev. Code §§ 3517.21(B)(9, 10); 3517.992(V). All that is required of a hypothetically aggrieved party is to have a subjective perception that a political statement lacks absolute, black and white truth. These are political statements which in many cases may be technically true but literally untrue, such as in the case of Congressman Peterson's service in the Marines. Or more likely predicated upon value judgments or political interpretations had Josh Mandel challenged his Pinocchio rating.

The commentators cited in this brief acknowledge that fact-checking organizations struggle to separate factual determinations from political interpretation. But this is their role as journalists. The media serves a broader public debate rooted in the fundamental freedoms of speech and petition for redress of grievances that the Ohio law suppresses. Questions of accuracy or truth arise constantly in the political process, but "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 375 (1927)(Brandeis, J. concurring). The mechanisms of popular government thrive not only on the free and open debate among the candidates and their platforms, but also on the trust that the candidates inspire in the electorate.

CONCLUSION

This case is an opportunity for the Court to reaffirm the foundational understanding that more speech, not less, is the remedy for political interpretation. Such an understanding can only be protected when a speaker can petition a federal court for pre-enforcement relief

from speech-repressive law. Accordingly, your *amicus* supports reversal of the Sixth Circuit's ruling.

Respectfully submitted,

William M. Todd
Counsel of Record
Government Integrity Fund
137 East State Street
Columbus, Ohio 43215
(614) 499-6904
wtodd@williammtodd.com

Counsel for Amicus Curiae
Government Integrity Fund

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The

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SUSAN B. ANTHONY LIST, ET AL.,

Petitioners,

v.

STEVEN DRIEHAUS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONERS

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER
One Bunker Hill Building
601 West Fifth Street,
Suite 800
Los Angeles, CA 90071
Tel: (213) 617-0414
Counsel for Amici Curiae Reason Foundation & Individual Rights Foundation

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER
PAUL M. SHERMAN*
901 North Glebe Road,
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
psherman@ij.org
**Counsel of Record*
Counsel for Amicus Curiae Institute for Justice

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1991, the Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute routinely files pre-enforcement challenges to laws that chill speech. The Institute is deeply concerned about the effect that the ruling below will have on the ability of speakers to seek such pre-enforcement judicial review in federal court, which the Institute believes is vital to the protection of the First Amendment.

Reason Foundation is a national, nonpartisan, and nonprofit public-policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies – including free markets, individual liberty, and the rule of law. Reason supports dynamic, market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* state that all parties have consented to the filing of this brief through the filing of blanket consent letters. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

by publishing Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org, and by issuing policy-research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Individual Rights Foundation was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file *amicus curiae* briefs in cases involving fundamental constitutional issues. IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

SUMMARY OF THE ARGUMENT

The State of Ohio has vested a government agency with the authority to determine the truth or falsity of core political speech and then punish those whose speech it deems false. The mere existence of such a body obviously raises important First Amendment questions. Indeed, it strikes at the very heart of America's constitutional tradition. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need

Oceania's Ministry of Truth."). Accordingly, it is of vital importance that federal courts fulfill their duty to evaluate the constitutionality of laws like Ohio's before those laws do irreparable harm to speakers.

The Sixth Circuit, in concluding that Petitioners lacked standing to challenge Ohio's law, failed to fulfill this duty. Despite the facts that this criminal statute had already been invoked against Petitioner SBA List once, that the Ohio Elections Commission had already found there was "probable cause" to conclude that the SBA List's speech violated the statute, and that both Petitioners alleged they wish to engage in materially the same speech in the future, the Sixth Circuit ruled that Petitioners cannot bring a pre-enforcement challenge. Why? Because Ohio punishes only speech it deems to be false, and Petitioners insist that their speech – the very speech that previously led to them being hauled before Ohio's truth commission – is true.

The Sixth Circuit's ruling is the height of formalism and represents a radical departure from the First Amendment justiciability principles applied by this Court and federal courts elsewhere in the country, which recognize that pre-enforcement challenges are critical to ensuring vibrant and unobstructed political discourse. This Court and most others appreciate that a First Amendment plaintiff bringing a pre-enforcement challenge to a statute that *arguably* proscribes his speech states a justiciable claim absent a strong indication that the statute will not be enforced, such as disavowal by the government – either

actual or implied from the statute having fallen into extreme disuse. But the Sixth Circuit demands far more: It requires either a near certainty of future enforcement or a prior definitive determination by the government that the plaintiff previously violated the law. If ratified by this Court, such a rule would foreclose pre-enforcement challenges that the vast majority of judges and other citizens think ought to at least be *heard*, regardless of how they are ultimately decided on the merits.

The Sixth Circuit's ruling is not only a departure from this Court's precedents, it also ignores the way statutes like Ohio's operate in the real world. In deciding there was no credible threat that Ohio's statute would be enforced against Petitioners, the court below failed to appreciate the significance of Ohio's complaint-driven enforcement mechanism, which allows "any person" to initiate mandatory proceedings before a government commission to adjudicate the truth or falsity of a political opponent's speech. Contrary to the Sixth Circuit's reasoning, this mechanism obviously makes it far *more* likely that the statute will be invoked. In fact, statutes like this are frequently used as weapons in campaign arsenals to silence or distract political opponents in the midst of heated elections.

The ruling below cannot be allowed to stand. This Court should reassert the vital importance of pre-enforcement review to the protection of First Amendment rights, and make clear that standing to bring pre-enforcement challenges under the First

Amendment is a practical inquiry that must take account not only of the literal language of a prohibition on speech, but also of how reasonable people would respond to the procedures surrounding the enforcement of that prohibition.

ARGUMENT

This Court has long recognized that the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted). Such speech "must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). This Court has also long recognized that speakers need not run the risk of prosecution before they may challenge laws that suppress speech, but may instead seek pre-enforcement review so long as they have "alleged an intention to engage in a course of conduct *arguably* affected with a constitutional interest, but proscribed by a statute, and there exists a *credible threat of prosecution* thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added) (citation omitted). Such a credible threat is presented by the mere existence of a statute that is "recent and not moribund," *Doe v. Bolton*, 410 U.S. 179, 188 (1973), and that the government has not "disavowed any intention" of enforcing, *Babbitt*, 442 U.S. at 302.

The Sixth Circuit's ruling cannot be reconciled with these principles. As explained in Section I, the ruling below drastically curtails the availability of pre-enforcement review and would, if ratified by this Court, do serious harm to the First Amendment. As explained in Section II, the proper resolution of the justiciability question in this case – and in all pre-enforcement challenges – must take account of the practical realities of how laws like Ohio's operate. Taking those practical realities into account in this case, Petitioners clearly have standing.

I. THIS COURT AND OTHER FEDERAL COURTS HAVE LONG RECOGNIZED THAT PRE-ENFORCEMENT JUDICIAL REVIEW OF SPEECH-SUPPRESSING LAWS IS VITAL TO THE PROTECTION OF THE FIRST AMENDMENT.

The First Amendment reaffirms important and highly valued rights that are at the heart of our constitutional tradition. But "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of [a] statute." *Bates v. State Bar*, 433 U.S. 350, 380 (1977). When that happens, "[s]ociety as a whole [is] the loser." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Pre-enforcement challenges play a vital role in preventing that from happening by removing impediments to the "'open marketplace' of ideas protected

by the First Amendment." *Citizens United*, 558 U.S. at 354 (citation omitted).

Threats to First Amendment freedoms necessitating pre-enforcement review arise not just in the high-stakes world of federal elections like in *Citizens United*, but in local politics and in the more mundane goings-on of everyday life. The decision below – which demands certainty of prosecution or a past finding of violation, plus an admission of intent to violate a criminal statute before allowing a pre-enforcement challenge – all but shuts down this crucial avenue of relief across a significant portion of this country. If not corrected, the Sixth Circuit's error will profoundly limit the free-speech rights of ordinary Americans.

Examples of the sort of speakers who will be unable to seek meaningful pre-enforcement protection for their First Amendment rights abound in the Federal Reports, but a handful of examples will suffice to illustrate the problem:

1. Julie Towbin was 17 when she was invited to attend a local political event organized by the Palm Beach County Democratic Executive Committee. *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1277 (S.D. Fla. 2012). Ms. Towbin was a former Page in the U.S. House of Representatives and had a "keen and abiding interest in politics." *Id.* She wanted to attend the event but was concerned that her purchase of its $150 ticket would run afoul of a provision of Florida law that prohibited, with limited exceptions, "political contributions by minors of more than $100 to

individual candidates or political organizations." *Id.* A single unlawful contribution is a first-degree misdemeanor; a second is punishable as a third-degree felony. *Id.* (citing Fla. Stat. § 106.08(7)(a)-(b)). When Ms. Towbin reached out to the Florida Elections Commission and State Attorney to ask whether the law applied, they declined to issue an "advisory opinion," and the State's Attorney General noted only that the "statute 'remains applicable'" and carries criminal penalties. *Id.* (citation omitted). Ms. Towbin ultimately did not go to the event, but "steadfastly [held] on to a 'definite, and serious, desire and intention to contribute in excess of $100 to a political committee and/or candidates of her choice'" if "not for the criminal penalties she [would] face[ ]." *Id.* (citation omitted). Rather than allow the statute to squelch her budding interest in political participation, she mounted a pre-enforcement challenge. *Id.* at 1281-83. Fortunately for her, the district court enjoined the unconstitutional statute, vindicating Ms. Towbin's rights and freeing her to engage in the political process. *Id.* at 1290-92. But that would not have happened in the Sixth Circuit. In Kentucky, Michigan, Ohio, and Tennessee, such a claim would have been dismissed as too speculative, absent more proof that the state would in fact enforce the statute against Ms. Towbin.

2. Steve Cooksey is a North Carolina resident living with Type II diabetes. *Cooksey v. Futrell*, 721 F.3d 226, 229-30 (4th Cir. 2013). He has been able to control his diabetes and lose 78 pounds by maintaining

a diet low in carbohydrates but high in fat. *Id.* at 230. Inspired by his lifestyle change and wishing to help others with similar problems, Mr. Cooksey started a website called "Diabetes Warrior" to talk about his weight loss and diet, distribute meal plans, provide advice to readers, and advertise his fee-based diabetes-support and life-coaching services. *Id.* His website stated that he was not a licensed medical professional and did not have any formal credentials. *Id.*

In January 2012, shortly after attending a nutritional seminar in which he expressed disagreement with dietary advice given by the director of diabetic services from a nearby hospital, Mr. Cooksey received a call from the Executive Director of the State Board of Dietetics/Nutrition, informing him that he and his website were "under investigation," and that the State Board had the statutory authority to seek an injunction to prevent the unlicensed practice of dietetics. *Id.* at 230-31. Mr. Cooksey was told he should shut down his life-coaching services. *Id.* at 231. He then received a 19-page red-pen review of his website, indicating on a line-by-line basis what the State Board described as "areas of concern," but which in reality were explicit instructions regarding what he could and could not say. *Id.* at 231-32.

Worried that the Board would take legal action against him, Mr. Cooksey brought a pre-enforcement First Amendment challenge and was eventually allowed his day in court, but only after the Fourth Circuit reversed a district court that made many of the same errors as the Sixth Circuit here. *Id.* at

234-41.[2] Mr. Cooksey would not have been so fortunate had he resided in Ohio instead of North Carolina. By the Sixth Circuit's reasoning, the State Board's communications pointing out "areas of concern" did not *conclusively* establish that Mr. Cooksey violated the law, or even make an official finding that there was "probable cause" to believe the law was violated. And Mr. Cooksey had not alleged that he intended to engage in speech that definitely violated the law, only that he intended to engage in speech that arguably came within the statute's reach. *Id.* at 238. Thus, under the Sixth Circuit's unduly narrow conception of pre-enforcement review, the North Carolina Board's startling act of censorship would have been entirely unreviewable.

3. James Wilson was arrested in El Reno, Oklahoma, after distributing anonymous handbills opposing the election of a candidate for state senate. *Wilson v. Stocker*, 819 F.2d 943, 945, 947 (10th Cir. 1987). Under then-existing Oklahoma law, the handbills were arguably illegal because they did not contain Mr. Wilson's name and address. *Id.* at 947-48 (citing Okla. Stat. tit. 26, § 15-111 (Supp. 1985)). The prosecutor never pursued the charges, but Wilson wished to continue the same conduct that precipitated his prior arrest, and he quite reasonably feared that he might be rearrested. *Id.* at 946. The Tenth Circuit gave Wilson relief, but he would not have had

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[2] Mr. Cooksey is represented by *amicus* Institute for Justice.

his day in court in the Sixth Circuit. Under Sixth Circuit doctrine, Wilson's prior arrest for the same conduct would not indicate a credible threat of prosecution in the future. After all, an arrest only establishes that the state has found *probable cause* that the law has been violated, exactly what the Commission panel found as to SBA List below.

If they had been in any of the four states of the Sixth Circuit, Ms. Towbin, Mr. Cooksey, and Mr. Wilson would have had to risk significant civil or criminal consequences to vindicate their constitutional rights. Without the possibility of pre-enforcement review, they likely would have remained silent, and the laws in question would have remained unchallenged, continuing to erode their and others' First Amendment freedoms unless someone with the extraordinary gumption (and means) to risk civil or criminal penalties came along.

That result cannot be reconciled with this Court's precedents. Although the Sixth Circuit persistently demands certainty of prosecution, this Court's repeated holdings demonstrate that all that is required is a credible threat – a threat that is presumed from the very existence of a non-moribund statute that arguably proscribes the plaintiff's speech. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968) (holding that pre-enforcement challenges are proper even without a particularized threat of enforcement, and even if the statute has not been recently enforced); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that when statute was "recent and not moribund,"

plaintiffs "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (permitting facial challenge though the pertinent provision of the act had "not yet been applied and may never [have] be[en] applied" when the State had not "disavowed any intention" of enforcing it); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (permitting challenge where state had "not suggested that the newly enacted law will not be enforced" and Court saw "no reason to assume otherwise"). This Court's holdings demonstrate that in such circumstances "the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

The Sixth Circuit's approach also starkly conflicts with the approach taken by its sister circuits, which presume a credible threat of prosecution absent strong evidence that the statute will not be enforced. *See, e.g., St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 484-86 (8th Cir. 2006); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999); *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15-17 (1st Cir. 1996). And unlike other circuits, the Sixth Circuit requires First Amendment plaintiffs to tarnish their own reputation by admitting they intend to engage in illegal conduct in order to get into court, Pet.App.15a, whereas other

circuits recognize that such a requirement would itself chill speech and therefore only require plaintiffs to demonstrate they intend to engage in conduct that *arguably* comes within the law's reach. *E.g., 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2013); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003); *Majors*, 317 F.3d at 721; *N.H. Right to Life Political Action Comm.*, 99 F.3d at 14.

If this Court were to ratify the Sixth Circuit's ruling, it would not only be turning its back on decades of precedent, it would seriously endanger the rights of speakers throughout the country. Accordingly, because the Sixth Circuit's ruling cannot be reconciled either with this Court's precedents or the vast weight of authority from other circuits, it should be reversed.

II. THIS COURT SHOULD CLARIFY THAT DETERMINING THE EXISTENCE OF HARM ARISING FROM A CREDIBLE THREAT OF PROSECUTION IS A PRACTICAL, NOT FORMALISTIC, INQUIRY.

As demonstrated above, the Sixth Circuit's ruling cannot be squared with this Court's precedent and should be reversed. But to prevent such rulings from happening in the future, this Court should clarify that the standing inquiry in pre-enforcement challenges is a practical, not formalistic, inquiry. That

inquiry must take account of the way that laws like Ohio's operate in the real world.

Ohio's law places enormous power in the hands of unelected, unaccountable complainants to initiate costly and time-consuming proceedings against political speakers. Under the challenged Ohio statute, upon receipt of a complaint by "any person" alleging a violation of the false-speech laws, the Commission *must* initiate proceedings. Ohio Rev. Code Ann. § 3517.153(A). And if the complaint is filed shortly before an election, a Commission panel *must* convene an expedited hearing to determine whether there is probable cause for the full Commission to hear the case and determine whether there has been a violation. *Id.* §§ 3517.154(A)(1), 3517.156(A)-(B). Absent all parties' agreement, the respondent has no right to argue, testify, or submit evidence to the panel to contest the charges. Ohio Admin. Code 3517-1-10(D)(1). If probable cause is found, full Commission proceedings begin. Ohio Rev. Code Ann. §§ 3517.155(A)(1), 3517.156(A). In that event, the Commission conducts a full administrative trial, including discovery, Ohio Admin. Code 3517-1-09, direct and cross examination of witnesses, *id.* 3517-1-11(B)(2)(d), and questioning by members of the Commission, *id.*

Although the court below recognized that Ohio's statute expressly allows "any person" to initiate a Commission proceeding, the court dismissed this concern, asking rhetorically, "[w]ho is likely to bring a complaint to set the wheels of the Commission in

motion?" Pet.App.4a, 12a. *Amici* respectfully submit, as did Petitioners below, *see id.*, that the answer is obvious: *a political opponent*.

Indeed, experience suggests that complaint-driven statutes like Ohio's are frequently used as strategic weapons to silence political speech in the final hours of political campaigns – when it is most valuable – precisely because they are so easy to invoke. For example, *amicus* Institute for Justice recently litigated in the Eleventh Circuit a challenge to certain Florida's campaign-finance laws that permit citizens to file a sworn complaint with the Florida Elections Commission alleging a violation. In that case, the investigations manager for the Commission and the Commission's Rule 30(b)(6) designee admitted under oath that approximately *98%* of the complaints it receives are "politically motivated," and that "many times" complaints are filed by individuals seeking to "punish their political opponent" or to "harass that person or otherwise divert their attention from their campaign." Dep. Tr. of David Flagg at 16:16-25, 18:1-2, 19:6-15, *Worley v. Roberts*, 749 F. Supp. 2d 1321 (N.D. Fla. 2010) (No. 4:10-cv-00423), ECF No. 40-26.

And Florida law is not an isolated problem. In another case litigated by the Institute for Justice, *Sampson v. Buescher*, 625 F.3d 1247, 1253 (10th Cir. 2010), which involved a particularly oppressive use of a complaint-driven private-enforcement provision in Colorado's campaign laws, *two* of the Colorado Secretary of State's experts admitted under oath that

private-enforcement provisions are often used to silence speech or to gain political advantage. One, a Colorado political pollster and strategist, testified that political opponents use the private-enforcement provision as a strategic tool during campaigns. Dep. Tr. of Floyd Ciruli at 37:19-39:1, *Sampson v. Coffman*, No. 1:06-cv-01858, 2008 WL 4305921 (D. Colo. 2008), ECF No. 30-40. The other, a lawyer who worked for the California Secretary of State and was general counsel to the California Fair Political Practices Commission, testified that most of the private complaints filed under California's private-enforcement provision were either baseless or brought for publicity purposes in order to give one competitor in an election an advantage. Dep. Tr. of Robert Stern at 27:21-28:9, 36:4-37:11, *Sampson v. Coffman*, No. 1:06-cv-01858, 2008 WL 4305921 (D. Colo. 2008), ECF No. 30-41. Consistent with these experiences, the district court in *Sampson* concluded that "[t]here can be no doubt that [complainants] used the private enforcement provisions to attempt to silence the plaintiffs by the filing of the complaint." *Sampson v. Coffman*, No. 06-cv-01858-RPM, 2008 WL 4305921, at *20 (D. Colo. Sept. 18, 2008), *aff'd in part, rev'd in part sub nom. Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

These examples illustrate that, in the real world, the risk of being dragged through the burdensome process of responding to investigations initiated by one's political adversaries is a formidable deterrent to political speech. Wholly aside from the indignity,

expense, and potential consequences, the process will inevitably distract the speaker's attention and resources away from getting out his message. This is especially so when expedited proceedings are initiated on the eve of an election.

This Court's precedents do not require courts to turn a blind eye to the destructive realities imposed by enforcement processes themselves. To the contrary, this Court long ago recognized that these harms are not eliminated by "the improbability of successful prosecution." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). "The chilling effect upon the exercise of First Amendment rights may derive *from the fact of the prosecution, unaffected by the prospects of its success or failure.*" *Id.* (emphasis added); *cf. Citizens United*, 558 U.S. at 335 (looking to practical concerns to determine whether regulatory scheme acted as a prior restraint).

Unlike the Sixth Circuit here, other courts recognize the importance of the practical concerns raised by complaint-driven enforcement mechanisms when evaluating justiciability. In *Chamber of Commerce v. FEC*, for example, the D.C. Circuit addressed a First Amendment pre-enforcement challenge to an FEC rule that seemed to restrict certain political communications to the plaintiff organizations' members. 69 F.3d 600, 601 (D.C. Cir. 1995). There was no imminent threat of enforcement proceedings because the FEC was publicly deadlocked on whether and how to enforce the rule, and a majority vote of the commission was necessary to institute enforcement

proceedings. *Id.* at 603. Nonetheless, the court found standing, because the unusual nature of the enabling statute permitted a "political competitor" to "challenge the FEC's decision *not* to enforce" and therefore subject the speaker to litigation "even without a Commission enforcement decision." *Id.*

The First Circuit addressed a similar issue in *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003). That case involved a criminal libel statute that, because of the operation of Puerto Rico law, permitted individuals to file a complaint with the police or pro se to initiate a criminal libel action; it was only after a probable-cause hearing that the prosecutors would become involved. *Id.* at 58-59. The court correctly recognized that standing would exist even if the prosecutors had "disavow[ed] any intention to prosecute" because they exercised no control over whether proceedings would be initiated. *Id.* at 59. It held that "[t]he plaintiff's credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that [he] would be convicted." *Id.*

Had the Sixth Circuit taken a more practical view of Ohio's false-political-speech law, as this Court and other circuit courts have done, it would have recognized that there was a credible threat of prosecution inherent in the design of Ohio's law. The court's failure to take these practical realities into account was error and must not be allowed to stand.

CONCLUSION

For the reasons stated above, the Sixth Circuit's ruling should be reversed.

Respectfully submitted,

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER
One Bunker Hill Building
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
Tel: (213) 617-0414
Counsel for Amici Curiae
Reason Foundation
& Individual Rights
Foundation

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER
PAUL M. SHERMAN*
901 North Glebe Road,
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
**Counsel of Record*
Counsel for Amicus Curiae
Institute for Justice

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Petitioners,

v.

STEVEN DRIEHAUS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
hirsen@earthlink.net

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Sixth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. JFF has made numerous appearances in this Court as *amicus curiae*, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and other cases concerned with the protection of political speech.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Ohio has hand-delivered a powerful political weapon to candidates and other politically motivated individuals. Ohio Rev. Code Ann. § 3517.21(B) is easily used a club to bludgeon opponents. It expressly targets and stifles "speech uttered during a campaign for

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

political office"—exactly when the First Amendment has its "fullest and most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

The Sixth Circuit's approach to standing enhances the cutthroat use of Ohio's statute, erecting such a high bar to standing that prospective challengers must first violate the law, admit guilt, and suffer a criminal *conviction* (Section I).[2] Even if a daring speaker assumes that risk, the statutory language thrusts unelected officials into a twilight zone where they must navigate the delicate distinctions between malicious falsehoods and political hyperbole (Section II). Finally, Ohio's statutory scheme encourages manipulation due to the ease in which anyone can file a complaint and set the wheels of criminal prosecution in motion—then dismiss it when the election is over, thus rendering the speech politically impotent. This virtually guarantees not only that speech will be chilled during critical election times, but also that future constitutional injuries will evade review (Section III).

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[2] Even if the sole threat were Driehaus' civil suit for defamation, the fear of a damage award may be as inhibiting of speech as threatened criminal prosecution. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

ARGUMENT

I. THE SIXTH CIRCUIT ENCOURAGES POLITICAL OPPONENTS TO USE THE THREAT OF CRIMINAL PROSECUTION AS A CLUB. THIS BREEDS DISRESPECT FOR THE LAW.

This Court has long endorsed pre-enforcement review, a "hold your tongue and challenge now" approach. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). This procedure "promotes good public policy by breeding respect for the law" rather than demanding that speakers undergo criminal prosecution as a prerequisite to challenging questionable statutes. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 488 (8th Cir. 2006). As the Ninth Circuit observed:

> [I]t would turn respect for the law on its head for us to conclude that ARLPAC lacks standing to challenge the provision merely because ARLPAC chose to comply with the statute and challenge its constitutionality, rather than to violate the law and await an enforcement action.

Az. Right to Life PAC v. Bayless, 320 F.3d 1002, 1007 (9th Cir. 2003). *See also Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996) ("That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases.").

By raising the bar for standing, the Sixth Circuit effectively forecloses pre-enforcement review and invites the use of Ohio law as a club to muzzle opposing views. This approach promotes disrespect for the law by requiring an actual conviction—and in this case, it

also breeds dishonesty by requiring Petitioners to affirm their intent to make a *false* statement.

In cases where the Sixth Circuit sustained standing, the challenger had already violated the law: *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012) (attorney Berry had standing—he had already engaged in the prohibited conduct by circulating a letter that publicly criticized a quasi-judicial state legislative ethics commission); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 490-492 (6th Cir. 1995) (candidate paid for a billboard that was ambiguous as to whether she was an incumbent—she was found to have violated the statute, and she intended to run again). Standing unquestionably existed in these cases—but it also exists where there is a credible threat of prosecution, as there is here. The Sixth Circuit is out of step with this Court and other Circuits. Pre-enforcement review protects both First Amendment rights and respect for the law.

II. OHIO CHILLS SPEECH BY VESTING STATE OFFICIALS WITH SWEEPING POWER TO SEPARATE TRUTH FROM FALSITY IN POLITICAL DEBATE.

The Sixth Circuit's approach to standing, coupled with Ohio's statutory language, is a deadly mix. Petitioners and Driehaus both claim to speak the truth about his vote for the Affordable Care Act. The public is entitled to hear both. But Driehaus has the upper hand, because he can wield the statutory weapon—using the massive resources of the Ohio Election Commission ("OEC")—as a club to silence Petitioners' interpretation. Justice Breyer's recent observation summarizes the danger:

> [T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart.

United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring). In the Sixth Circuit, the "chill" has hardened into a freeze by requiring an actual criminal conviction just to challenge the statute.

Legal liability for speech varies according to context. False statements are not always protected. Laws against perjury protect the integrity of the legal system and ensure that judgments are founded on truth. *Id.* at 2546. Defamation of a public official requires knowledge that a statement is false or reckless disregard for the truth (*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964))—a standard replicated by Ohio and other states in the election context. Although that standard helps prevent "the chilling of truthful speech on matters of public concern" (*Alvarez*, 132 S. Ct. at 2463 (Alito, J., dissenting)), it is difficult to apply in a timely manner while an election is pending. In the heat of public debate, core political speech needs "breathing space" to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Moreover, the Ohio statute is not a "harmless, empty shadow" the state has declined to enforce over several decades. *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (no standing where there was an 80-year-old "tacit agreement" by the state not to prosecute violations of a statute prohibiting contraceptive devices). It is a constitutionally questionable regulation

that Driehaus actually used to punish Petitioners for their commentary on the implications of his vote.

A. The Ohio Statute Is A Content-Based Regulation.

Ohio Rev. Code Ann. § 3517.21(B) is a classic content-based regulation comparable to other challenged laws in the election context. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 197 (1992) (statute prohibiting political speech within 100 feet of polling place on election day was content-based because it only regulated speech relating to political campaigns and could not be applied without reference to content). In Ohio's statutory scheme, subsection (9) applies to "the voting record of a candidate or public official." Subsection (10) covers false statements concerning a candidate. These provisions cannot be applied without reference to content.

"'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted)." *Alvarez*, 132 S. Ct. at 2543. The government—not the speaker—bears the burden of proving constitutionality. *Id.*, citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004). Even where the government does not favor one side of a political controversy, the First Amendment is hostile to content-based regulations. *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980).

As a content-based regulation, Ohio's statute is fraught with constitutional flaws—but in the Sixth Circuit, its chances of review are slim.

B. The Ohio Statute Raises Thorny Issues Of Interpretation In The Heat Of Political Debate.

The need for review is especially critical in light of the broad powers of the Ohio Elections Commission. OEC must undertake the formidable task of interpretation to determine what is true and what is false. The statute presupposes that the state possesses an independent right to separate truth from falsity in political debate—a questionable proposition at best. *Meyer v. Grant*, 486 U.S. 414, 419-420 (1988) ("[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us."). OEC's decisions can potentially sway elections by stifling open debate. The Ohio statute covers statements that are demonstrably true or false ("Candidate X voted for [or against] the Affordable Care Act") as well as conclusions drawn from a candidate's vote—as in this case. Does the Affordable Care Act indirectly provide federal funds for abortion by subsidizing abortion-inclusive coverage for lower-income persons (as Petitioners contend)—or does it not, because abortions must be funded out of a separate account (as Driehaus argues)? Pet. Op. Br. 4-5. Reasonable minds could disagree, but the Sixth Circuit's approach "compel[s] the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535 (1945). The facts here highlight this Court's warning that "[t]he interpretive process itself would create an inevitable, pervasive, and serious risk

of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." *Citizens United v. FEC*, 558 U.S. at 327. Such a task raises the specter of "temporary political majorities ...exercis[ing] their power by determining for everyone what is true and false, as well as what is right and wrong." Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1, 3 (2008). As the Washington Supreme Court observed, "any statute permitting censorship by a group of unelected government officials is inherently unconstitutional." *Rickert v. Pub. Disclosure Comm'n,* 161 Wn.2d 843, 854, 168 P.3d 826, 831 (Wash. 2007). In Ohio, the Elections Commission is composed of seven unelected persons—three appointed by the Governor from each major political party upon recommendation by the Democratic and Republican caucuses of the General Assembly, and the seventh an independent person (not affiliated with either party) appointed by the six partisan members.[3]

This case underscores the need for judicial sensitivity to the danger of self-censorship when First Amendment values are at stake. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988); *Meese v. Keene*, 481 U.S. 465, 473 (1987). Courts should grant review in cases where plaintiffs intend to engage in conduct that "could reasonably be interpreted as making false statements with reckless disregard for the truth of those statements" because they have good cause to fear prosecution. *281 Care Comm. v. Arneson*,

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[3] See http://elc.ohio.gov/History.stm (last visited 02/17/14).

638 F.3d 621, 628 (8th Cir. 2011). *See also Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (plaintiffs have standing to challenge a statute that "arguably covers" their constitutionally protected speech, because "most people are frightened of violating criminal statutes"); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 58 (1st Cir. 2003) (allowing pre-enforcement challenge to statute where plaintiff wanted to publish articles that would "exacerbat[e his] exposure to a criminal libel prosecution"). Here, the interpretive process is particularly treacherous because Ohio, like several other states, has patterned its statute after the standard for defamation actions involving public officials—knowledge of falsity or reckless disregard for the truth. Ohio Rev. Code Ann. § 3517.21(B)(10). The original context of that standard was applied primarily to journalists and other potential communicators of defamatory material. In this context it opens the door for political maneuvering.

C. In The Political Speech Arena—As In Defamation Actions Against Public Officials—It Is Difficult To Distinguish Deliberate Or Recklessly False Statements From Mere Political Rhetoric.

Ohio's election law borrows the "actual malice" standard crafted by this Court for defamation actions by public figures. *New York Times Co. v. Sullivan*, 376 U.S. 254. That standard can be excruciating to apply even in its original context:

> The difficulty of making this distinction [deciding whether a statement was made with "reckless disregard for the truth"] is reflected in

> cases dealing with defamation against public officials. Courts and scholars constantly struggle to draw a line between knowingly or recklessly false statements and uses of rhetoric, exaggeration, and ideologically-derived facts.

281 Care Comm. v. Arneson, 638 F.3d at 630 n. 1.

The "actual malice" standard was crafted so as to preserve America's "profound national commitment" to "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. at 271. In particular, "[i]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages." *Id.* at 281, quoting *Coleman v. MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908).

This Court protects political rhetoric, eschewing a rigid approach that might be appropriate in other contexts. *Greenbelt Coop Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (it was "no more than rhetorical hyperbole" to allege blackmail by a city council member); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) ("traitor" was used "in a loose, figurative sense," not as a representation of fact). Campaign speech is "[o]ften characterized as hyperbole and overstatement" and "tends toward exaggeration, to vilification...and even to false statement." *281 Care Comm. v. Arneson*, 638 F.3d at 630 n. 1, citing Terri R. Day, *"Nasty as They Wanna be Politics:" Clean Campaigning and the First Amendment*, 35 Ohio N.U. L. Rev. 647, 652 (2009). Election time debates may include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.*

v. Sullivan, 376 U.S. at 271. Even a false statement may contribute to the debate, producing a sharper impression of truth by its collision with error. *Id.*

The "actual malice" standard was fashioned to limit liability—but Ohio's statutory scheme, especially when combined with the Sixth Circuit's high bar for standing, "expands liability in a different, far greater realm of discourse and expression," thereby "invert[ing] the rationale for the exception.... A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it." *Alvarez*, 132 S. Ct. at 2545. When applied to campaign speech, the "actual malice" standard is precarious because "neither factual error nor defamatory content removes the constitutional shield from criticism of official conduct." *New York Times Co. v. Sullivan*, 376 U.S. at 273. Petitioners criticized Driehaus simply by expressing conclusions about the implications of his affirmative vote on the Affordable Care Act. In *New York Times*, this Court observed that the Sedition Act of 1798—making it a crime to publish false or malicious statements against federal officials—was "vigorously condemned as unconstitutional" and has been presumed invalid by the Justices "because of the restraint it imposed upon criticism of government and public officials." *Id.* at 273-274, 276.

Moreover, even in a public official's defamation action this Court refuses to place the burden of proving truth on the speaker:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads

> to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.

Id. at 279. As in cases involving political debate, there is grave danger of chilling protected expression—including truthful speech. "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* at 279.

Constitutional protection for criticism of public officials is "appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen." *Id.* at 262. This avoids the "unjustified preference" that would otherwise accrue to public officials because of the immunity they enjoy in the exercised of their official duties. *Id.* at 282, citing *Barr v. Matteo*, 360 U.S. 564, 575 (1959).

D. This Court's Ruling Has Broad Implications For Litigants In Other States.

Ohio's statute is constitutionally questionable. Although that is not the issue before this Court, a ruling in Petitioners' favor will keep the court doors open for litigants whose First Amendment rights have been chilled by similar state election laws. A ruling against Petitioner would slam the door in their faces and perpetrate constitutionally suspicious practices—leaving injuries to free expression without a remedy.

Several states have election laws with language requiring knowledge or reckless disregard for the truth—identical or similar to Ohio's standard: Colo. Rev. Stat. § 1-13-109; Fla. Stat. Ann. § 104.271(2); Minn. Stat. § 211B.06; Mont. Code Ann. § 13-37-131 (failure to verify public voting record is evidence of reckless disregard); N.C. Gen. Stat. § 163-274(a)(8); N.D. Cent. Code § 16.1-10-04; Or. Rev. Stat. Ann. § 260.532; Rev. Code Wash. § 42.17A.335. Some states require actual knowledge that a statement is false: Alaska Stat. § 15.56.014; Mass. Gen. Laws ch. 56 § 42; Tenn. Code Ann. § 2-19-142; Utah Code Ann. § 20A-11-1103; W. Va. Code § 3-8-11; Wisc. Stat. § 12.05. A few states have more specific requirements: Iowa Code § 39A.4(c)(3) (false statements about qualifications or party affiliations); Mich. Comp. Laws § 168.931(3) (false statements lacking signatures); Miss. Code Ann. § 23-15-875 (false statements regarding a candidate's private life); Va. Code Ann. § 24.2-1005.1 (certain false statements to voters to impede the exercise of their right to vote). Three states have repealed statutes found to be unconstitutional: Me. Rev. Stat. Ann. tit. 21-A, § 1014-A (repealed 2009); N.Y. Elec. Law § 472(a) (repealed 2009); Nev. Rev. Stat. § 294A.345 (repealed 2005).

State court cases demonstrate the need for judicial review. A simple negligence standard will not pass constitutional muster. *District One Republican Comm'n v. District One Democrat Comm'n*, 466 N.W.2d 820 (N.D. 1991); *Snortland v. Crawford*, 306 N.W.2d 614 (N.D. 1981) (negligent false statements are not actionable). The Louisiana Supreme Court acknowledged the state's interest in fair elections, but found the standard in La. Rev. Stat. Ann. § 18:1463(c)

("knows or reasonably expected to know") unconstitutional. *State v. Burgess*, 543 So. 2d 1332, 1335-1336 (La. 1989). The Court also found the terms "scurrilous" and "irresponsible adverse comment" to be overly broad, encompassing both true and false speech about candidates. *Id.* at 1335. In Washington, a sharply divided state supreme court ruled that Rev. Code Wash. § 42.17.530(1)(a) was facially unconstitutional because it lacked a requirement that prohibited statements be actually defamatory (harmful to a candidate's reputation) rather than merely false. *Rickert v. Pub. Disclosure Comm'n,* 161 Wn.2d at 852, 168 P.3d at 830 (political brochure stated that opposing candidate had voted to close a facility for the developmentally challenged).

Some state courts have thoughtfully upheld free speech rights when confronted with challenges:

- *State ex rel. Hampel v. Mitten*, 227 Wis. 598, 609, 278 N.W. 431, 436 (Wis. 1938) (Statements of opinion regarding opposing candidate's moral character were not actionable under Corrupt Practices Act.)

- *State ex rel. Skibinski v. Tadych*, 31 Wis. 2d 189, 194, 142 N.W.2d 838, 841 (Wis. 1966) (Statements that candidate was "laughing stock of county" and wasted taxpayer money were "conclusions, comment, and opinion"—not statements of fact.)

- *Thornton v. Johnson*, 253 Or. 342, 363, 453 P.2d 178, 188 (1969) ("Whether or not the Attorney General had the authority to represent the

School District [as he represented in a press release] is open to dispute.")

- *Mosee v. Clark*, 253 Or. 83, 86-87, 453 P.2d 176, 177 (1969) ("[R]eturn a proven leader" might have implied that the former county sheriff was an incumbent county officer—which he was not—but also might have meant that he had worked in county government and been a governmental leader—which was true.)

- *Sumner v. Bennett*, 45 Ore. App. 275, 280-281, 608 P.2d 566, 569 (1980) (Characterization of candidate's voting record was a matter of opinion—not false within the meaning of Or. Rev. Stat. Ann. § 260.532 and thus not actionable.)

- *State v. 119 Vote No! Committee*, 135 Wn.2d 618, 632, 957 P.2d 691, 699 (Wash. 1998) (Court held unconstitutional a statute that broadly prohibited all false political statements of material facts made in political advertisements.)

These and other state cases highlight the challenge courts face when applying the actual malice standard—and the need to give speakers the benefit of the doubt when more than one interpretation is possible. *Citizens United v. FEC*, 558 U.S. at 327; *see, e.g., Committee of One Thousand to Re-Elect State Senator Walt Brown v. Eivers*, 296 Ore. 195, 202, 674 P.2d 1159, 1163 (1983) (reasonable inference that proposed legislation would have established a statewide property tax) ("[S]tatements are not 'false'...if any reasonable inference can be drawn from the evidence that the statement is factually correct or that

the statement is merely an expression of opinion.") Even the Sixth Circuit acknowledges that statements subject to differing interpretations are not false. *Briggs v. Ohio Elections Comm'n*, 61 F.3d at 494 (politician's billboard ambiguous as to whether she was an incumbent).

III. THE SIXTH CIRCUIT'S POSITION ON STANDING VIRTUALLY GUARANTEES THAT CONSTITUTIONALLY FLAWED STATUTES WILL EVADE REVIEW.

"Like forecasted hurricanes, approaching elections invariably give rise not only to gusts of wind but also to feverish preparations. And, just as the prudent fisherman does not trust in chance to save his boat from the gathering storm, the sage political activist does not rely on an unenlightened electorate to save her candidate from the vicissitudes of the ballot box." *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 10 (1st Cir. 1996). Elections are like hurricanes in another way—quickly gone, yet sometimes leaving destruction spread across the now-sunny landscape. Another storm will come and the same damage will recur unless adequate repairs are undertaken.

Ohio has crafted an easy way to silence a political opponent and then dismiss the complaint after the election is over – when allegedly it is moot and immune to further review. Pet. 34-35; Reply 5. The "hurricane" has come and gone. Speakers have been silenced, and winning candidates have taken office. But under long-standing precedent, the controversy remains alive and well. Damage has been done and it will happen again,

evading review indefinitely if the court dismisses the current case.

Article III standing must exist at all stages of review. *Steffel v. Thompson*, 415 U.S. 452, 460 n. 10 (1974). Mootness is derived from the same prudential considerations as standing and ripeness, although it revolves around ongoing events. *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 34 (1st Cir. 1999). It has been defined as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' H. P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1384 (1973)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). A case becomes moot when the issues presented are no longer live or the parties lack a "legally cognizable interest in the outcome." *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979), quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969). There are two requirements: (1) "no reasonable expectation...that the alleged violation will recur"; and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis,* 440 U.S. at 631 (class action alleging racial discrimination in hiring was moot because there was no longer a shortage of firefighters and minorities had been hired).

The party asserting mootness bears the burden of persuading the court. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 189 (2000) (reversing decision holding that petitioners' citizen suit for civil penalties under Clean Water Act was moot

when respondent came into compliance). "The burden is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The test is stringent—voluntary cessation of allegedly illegal conduct is insufficient. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). It must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 203.

Here, the required clarity is lacking. This case—like many other election cases—fits squarely within a well-recognized exception to the mootness doctrine. Ordinarily an appeal must be dismissed if, pending review, conditions change that render it impossible for the court to grant the plaintiff effectual relief. *Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U.S. 498, 514 (1911). But this Court has long recognized an exception where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U.S. at 514 (public interests at issue in ICC orders should not be defeated by short orders that expire pending review).

Election-related cases are the epitome of this exception. There is rarely enough time to resolve even a timely filed challenge before the election is held. In these cases, the "capable of repetition, yet evading review" doctrine is appropriate for both "as applied" challenges and facial attacks. *Storer v. Brown*, 415

U.S. 724, 737 n.8 (1974). Numerous cases testify to the application of this doctrine in the world of elections and political speech:

- *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972) (A challenge to Tennessee's residency requirement for voting was not moot even though Blumstein was now eligible to vote—it applied to others and would be capable of repetition yet evading review.)

- *Storer v. Brown*, 415 U.S. at 737 n.8 (Issues regarding independent candidates' access to ballot were not moot even though the 1972 election was over, because the California statutes would be applied in future elections).

- *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978) (Although the 1976 referendum had been held and proposed constitutional amendment defeated, the case was not moot. The time between legislative authorization and submission to the voters was too short for complete judicial review. The 1976 election was the fourth time a proposed graduated income tax amendment was submitted to the Massachusetts voters, and appellants intended to continue opposing it.)

- *Democratic Party v. Wisconsin*, 450 U.S. 107, 115 n.13 (1981) (This challenge to state requirement that delegates vote according to results of open primaries was not moot because the Wisconsin Supreme Court's order would remain and control future elections. Even if it

had only controlled the 1980 election, it would be capable of repetition yet evading review.)

- *Meyer v. Grant*, 486 U.S. at 417 n. 2 (Prohibition on paid circulators violated the rights of persons circulating initiative petition for signatures. Although the November 1984 election had passed, Colorado granted initiative proponents only six months to gather the necessary signatures—not enough time to obtain review and act on the ruling. The initiative had not been enacted and appellees continued to advocate its adoption.)

- *Norman v. Reed*, 502 U.S. 279, 288 (1992) (Challenge to prohibition on new political party using its party name on the 1990 ballot was not moot because it was likely that the same parties would "generate a similar, future controversy subject to identical time constraints.")

- *Federal Election Comm'n v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 462 (2007) (Even though WRTL would not run exactly the same three advertisement, it could not reasonably obtain review before the 2004 election was over.)

- *Davis v. FEC*, 554 U.S. 724, 735 (2008) (Davis' case, concerning a candidate's right to spend his own money, could not be resolved before the 2006 election concluded.)

- *Mangual v. Rotger-Sabat*, 317 F.3d at 61 (News reporter intended to continue writing about government corruption and identified persons who might threaten him with prosecution.)

- *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d at 18: ("N-PAC's resolve that it will continue to make expenditures which are arguably prohibited by RSA 664:5, V leads to a reasonable expectancy that N-PAC will again find itself in the same quandary involving the same statutory scheme.")

- *Majors v. Abell*, 317 F.3d at 722 (Candidate plaintiff has no duty to run in every election to keep lawsuit alive.)

In some instances, the facts can be carefully distinguished and a case actually is (or may be) moot. In *Steffel*, Petitioner's handbilling activities were directed against the Vietnam War and United States' foreign policy in Southeast Asia, but recent developments required that the District Court consider, on remand, whether there was a continuing live controversy. *Steffel v. Thompson*, 415 U.S. at 459-460. In *Golden v. Zwickler*, 394 U.S. 103 (1969), the sole target of anonymous election campaign literature was a Congressman who had retired to be a New York Supreme Court Justice and there was no prospect that he would run for office again. But here, even if Driehaus will never run again, he is not the "sole target" of Petitioner's speech.

Petitioner is an ideological advocacy group devoted to electing candidates and promoting policies to abolish abortion. (See http://www.sba-list.org/about-sba-list/our-mission.) When such a group seeks injunctive and declaratory relief, it is typically concerned about recurring issues in future elections. *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d at 17-18 (prayer for declaratory relief "affects expenditures that

N-PAC may choose to make in *future* elections"). Several years ago, the Ninth Circuit adjudicated a pro-life group's challenge to Washington State's Public Disclosure Law, holding that "[t]he passage of Initiative 1000 in 2008 [did] not alter the justiciability of Human Life's constitutional challenge." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1001-1002 (9th Cir. 2010). The Court observed that:

> Human Life is a politically active organization that has been heavily involved in public debates about pro-life issues in the past and intends to undertake future communications like those it wished to make in conjunction with the Initiative 1000 vote. This is sufficient to establish a reasonable expectation that Human Life will face the prospect of enforcement of the Disclosure Law again.

Human Life of Wash., Inc. v. Brumsickle, 624 F.3d at 1002. This Court, similarly, rejected a mootness argument where a pro-life advocacy corporation "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period and there is no reason to believe that the FEC will 'refrain from prosecuting violations' of BCRA" (citations omitted)." *WRTL*, 551 U.S. at 463. Similar circuit cases have also fallen within the "capable of repetition yet evading review" exception: *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 779 (9th Cir. 2006) (AKRTL intended to engage in an ideological telemarketing campaign when challenged provisions of Alaska law remained in place—after the relevant ballot initiative vote); *Cal. Pro-Life Council, Inc. v. Getman*

(CPLC-I), 328 F.3d 1088, 1095 n. 4 (9th Cir. 2003) (advocacy group planned to continue distribution of voter guides in spite of challenged disclosure requirements); *Reich v. Local 396, Int'l Bhd. of Teamsters*, 97 F.3d 1269, 1272 n.5 (9th Cir. 1996) (challenge to withholding information from a candidate after the candidate's opportunity to be elected had passed).

"[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. at 340. Ohio's chilling statutory scheme suppresses core political speech, but in the Sixth Circuit those laws are now virtually immune from challenge.

CONCLUSION

For the reasons stated above, this Court should reverse the Sixth Circuit decision.

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive, Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
hirsen@earthlink.net

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

John Phillippe
Chief Counsel
Republican National Committee
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8500

Michael T. Morley*
223 Pawnee Road
Cranford, N.J. 07016
(860) 778-3883
michaelmorleyesq@hotmail.com
**Counsel of Record*

Counsel for Amicus Curiae Republican National Committee

Library of Congress
Law Library

QUESTION PRESENTED

Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10) prohibit people from knowingly or recklessly making false statements about political candidates or their voting records in order to affect the outcome of an election. Any person may file a complaint against a speaker for allegedly violating these provisions. Such a complaint may trigger multiple hearings before an administrative body concerning the speaker's statements, an investigation, subpoenas of the speaker's personal papers, and even a criminal prosecution. Political action committees ("PACs") such as Petitioners Susan B. Anthony List ("SBA List") and Coalition Opposed to Additional Spending and Taxes ("COAST") regularly engage in political speech about candidates and controversial issues in the course of elections.

Are the challenges to §§ 3517.21(B)(9) and (B)(10) brought by SBA List and COAST justiciable, on the grounds that those entities face a realistic possibility of complaints being lodged against them in response to their speech, which will substantially burden and chill that speech by subjecting them to the inconvenience, cost, and intrusion of subpoenas, investigations, and administrative proceedings to defend the truth of their political claims?

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INTERESTS OF *AMICUS CURIAE*[1]

The Republican National Committee ("RNC") is a national political party committee dedicated to ensuring the integrity of the electoral process; safeguarding the fundamental right to vote of all Americans; and representing the interests of Republican voters and candidates at all levels throughout the nation.

STATEMENT OF THE CASE

A. Ohio's System for Policing Allegedly False Political Speech

1. The State of Ohio has enacted a complex code regulating political speech that prohibits approximately a dozen different types of allegedly false or misleading statements. Ohio Rev. Code §§ 3517.21(B), 3517.22(B) (collectively, "Political Speech Prohibitions"). Among other things, Ohio law makes it a crime for any person, during any "campaign for nomination or election to public office or office of a political party" to use "campaign materials," knowingly and with the intent to affect the campaign's outcome, to either:

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. Pursuant to S. Ct. R. 37.6, *amicus curiae* certifies that no counsel for a party authored any part of this brief, nor did any person or entity, other than the *amicus*, its members, or its counsel, make a monetary contribution to fund the preparation or submission of this brief.

- "[m]ake a false statement concerning the voting record of a candidate or public official," *id.* § 3517.21(B)(9); or

- in any way "disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate," *id.* § 3517.21(B)(10).

2. State law grants the Ohio Elections Commission ("Commission") "exclusive original jurisdiction to determine whether there has been a violation of those provisions." *State ex rel. Ohio Democratic Party v. Blackwell*, 855 N.E.2d 1188, 1198-99 (Ohio 2006). A person may be prosecuted for violating Ohio's Political Speech Prohibitions only after the Commission has concluded that a violation has occurred. Ohio Rev. Code §§ 3517.21(C), 3517.153(C).

Proceedings before the Commission may begin only after a complaint has been filed by the Secretary of State or a member of a county board of elections, or by any person who submits an affidavit based on personal knowledge. *Id.* § 3517.153(A). When a complaint is filed, a Commission attorney must review it within one business day. *Id.* § 3517.154(A)(1). If the attorney concludes that the complaint alleges a violation of Ohio's Political Speech Prohibitions and was filed within 60 days of a primary or special election or 90 days of a general election, a panel of the Commission must hold an

expedited hearing on it within two business days, *id.* §§ 3517.154(A)(2)(a), 3517.156(B)(1).

The panel must be comprised of at least three Commission members, no more than half of whom may belong to the same political party. *Id.* § 3517.156(A). It must determine whether probable cause exists to refer the case to the full Commission for a hearing, which must be held within 10 days of such ruling, *id.* §§ 3517.156(A), (C)(2). If the panel concludes there is insufficient evidence to make a probable cause determination, it must direct an "investigatory attorney" to investigate the complaint, and refer the matter to the full Commission to review the evidence she gathers. *Id.* § 3517.156(C)(3). If the panel concludes that probable cause does not exist to believe that the law has been violated, it must dismiss the complaint. *Id.* § 3517.156(C)(1).

When a panel dismisses a complaint, the person who filed it may request reconsideration by the full Commission, which must rule on the request within three business days. *Id.* § 3517.156(E). If the Commission grants reconsideration, it shall hold a hearing on the complaint as if the panel had referred the complaint to it. *Id.* If the Commission denies reconsideration, the person who filed the complaint must pay reasonable attorneys' fees and the costs of the Commission panel. *Id.*

When the full Commission receives a Complaint, whether through referral by a panel or reconsideration of a panel's dismissal, it must determine whether, "by clear and convincing

evidence," the alleged violations of Ohio's Political Speech Prohibitions occurred. *Id.* § 3517.155(A)(1), (D)(1). If it concludes that those laws were violated, the Commission may issue a public reprimand, Pet. App. 53a;[2] *see, e.g.*, *SEIU Dist. 1199 v. Ohio Elections Comm'n*, 822 N.E.2d 424, 428 (Ohio App. 2004); refer the matter to the appropriate prosecutor, Ohio Rev. Code § 3517.155(A)(1)(c), (D)(2); or instead determine that good cause exists to do neither, *id.* § 3517.155(A)(1)(a).[3] A prosecutor is not required to take further action on a Commission referral. *See, e.g.*, *Team Working for You v. State Elections Comm'n*, 754 N.E.2d 273, 276 n.2 (Ohio App. 2001). If the Commission believes that the evidence is insufficient to allow it to determine whether a Political Speech Prohibition was violated, it may refer the matter to an "investigatory attorney" to gather additional evidence. *Id.* § 3517.155(B).

If either the Commission or a panel determines that a complaint is frivolous, it may order the person who filed it to pay reasonable attorneys' fees, as well as the costs of the panel or the Commission. *Id.* § 3517.155(E).

3. Judicial review in state trial court is available for certain types of rulings by a panel or the Commission. *See id.* § 3517.157(D). A person may

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[2] "Pet. App." refers to the Appendix to the Petition for Certiorari.

[3] For violations of certain other election-related statutes, the Commission may impose a fine. Ohio Rev. Code § 3517.155(A)(1)(b).

appeal a finding by the Commission that he violated a Political Speech Prohibition, regardless of whether the Commission issues a reprimand or recommends prosecution. *See Flannery v. Ohio Elections Comm'n*, 804 N.E.2d 1032, 1035 (Ohio App. 2004) (discussing appeal of Commission finding that violation occurred, despite lack of public reprimand or referral for prosecution); *SEIU Dist. 1199*, 822 N.E.2d at 428 (discussing appeal of Commission finding that violation occurred and resulting public reprimand, despite lack of referral for prosecution); *Team Working for You*, 754 N.E.2d at 277 n.2 (adjudicating appeal of Commission's findings after it referred matter to a prosecutor, despite prosecutor's decision not to proceed).

A complainant, in contrast, may not seek judicial review of a decision by a panel or the Commission to dismiss a complaint due to lack of probable cause. *Billis v. Ohio Elections Comm'n*, 766 N.E.2d 198, 200 (Ohio App. 2001); *see also State ex rel. Common Cause/Ohio v. Ohio Elections Comm'n*, 806 N.E.2d 1054, 1059-60 (Ohio App. 2004) (mandamus unavailable to challenge panel determination regarding lack of probable cause). After a panel or the Commission has determined that probable cause exists, however, a complainant may challenge the Commission's subsequent determination that a statutory violation did not actually occur. *Common Cause/Ohio v. Ohio Elections Comm'n*, 779 N.E.2d 766, 770-71 (Ohio App. 2002).

B. Susan B. Anthony List Is Accused of False Political Speech

Petitioner Susan B. Anthony List ("SBA List"), a political action committee ("PAC"), distributed political advertising material criticizing congressional candidate and then-Representative Steve Driehaus for voting in favor of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010). Pet. App. 3a, 43a. The advertisements contending that he voted "FOR taxpayer-funded abortion." *Id.* SBA List also attempted to post a billboard containing that message, but the advertising company refused to accept the advertisement after Driehaus threatened to take legal action against it. *Id.*

In October 2010, Driehaus filed a complaint with the Commission, alleging that SBA List's advertisements violated Ohio Rev. Code §§ 3517.21(B)(9) and (10). *Id.* at 3a, 43a-44a. Because the general election was only a few weeks later, the complaint was referred to a panel, which found that probable cause existed to believe the statutes had been violated. *Id.* at 4a, 44a. The parties agreed to postpone a hearing before the full Commission until after the election. *Id.* at 45a.

In the meantime, in mid-October 2010, SBA List filed the instant lawsuit to enjoin further proceedings before the Commission. Pet. App. 4a-5a, 45a. The district court, however, stayed that federal case under *Younger v. Harris*, 401 U.S. 37 (1971), pending the completion of the Commission's proceedings. *Id.* at

5a, 45a. After Driehaus lost the election, he withdrew his complaint before the Commission and the administrative proceedings terminated. *Id.* at 5a, 45a.

Petitioner Coalition Opposed to Additional Spending and Taxes ("COAST"), which operates two PACs, also wishes to publicly declare that the Affordable Care Act provides government-subsidized abortions and criticize other candidates who voted in favor of it. Pet. App. 5a, 46a-48a. COAST has been deterred from disseminating such communications, however, by the threat of having to defend itself before the Commission, like SBA List. *Id.* at 6a, 46a-48a. COAST also has refrained from engaging in speech concerning the true costs of a proposal to introduce street cars to Cincinnati, for fear of the Commission disagreeing about how much the proposal would cost. *Id.* at 49a. It filed its own lawsuit against the Commission, raising claims similar to SBA List's. *Id.* at 2a, 47a.

C. Procedural History and Rulings Below

1. SBA List's Amended Complaint, filed in the U.S. District Court for the Southern District of Ohio, alleges in relevant part that Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10) are unconstitutional, both facially and as applied to lobbyists taking positions on political issues. J.A. 122-124.[4] It contends that the Commission's investigatory

[4] "J.A." refers to the Joint Appendix the parties filed in this Court.

procedures are unconstitutional as well. *Id.* at 125. The Amended Complaint seeks a declaration that §§ 3517.21(B)(9) and (B)(10) are unconstitutional and an injunction against their enforcement. *Id.* at 127-28. COAST's lawsuit, containing materially identical claims, was consolidated with the SBA List suit. Pet. App. 47a.

2. The district court dismissed SBA List's and COAST's suits, contending that neither case was ripe, Pet. App. 31a, 57a, and neither plaintiff had standing, *id.* at 34a, 62a. SBA List argued that its speech was being chilled because the Commission already had concluded that probable cause existed to believe that it had violated Ohio law, and it intended to engage in "substantially similar activity in the future." *Id.* at 25a-26a.

Rejecting that claim, the court held that the plaintiffs' claims were not ripe, because whether the Commission or anyone else would seek to enforce Ohio Rev. Code §§ 3517.21(B)(9) or (B)(10) against them at some point in the future "is contingent on a number of uncertain events." *Id.* at 26a n.6, 56a-57a. Therefore, the plaintiffs could not establish that they presently faced a "credible threat of enforcement." *Id.* The court also found that, because of the vagueness of SBA List's allegation concerning the precise statements it intended to make in the future, it was impossible to determine whether someone was likely to try to apply those provisions to it. *Id.* at 30a.

The district court also concluded that both plaintiffs lacked standing. It held that a plaintiff

wishing to bring a First Amendment challenge must show that the challenged statute "will be immediately enforced against it." *Id.* at 34a. SBA List and COAST could not make such a showing, because Ohio law established several steps that had to be satisfied before Ohio Rev. Code §§ 3517.21(B)(9) or (B)(10) could be enforced against them, rendering any such enforcement purely speculative. *Id.* at 34a, 61a. The court further reasoned that, because the plaintiffs alleged that they intended to engage in truthful future speech, and the challenged provisions prohibited only false speech, the likelihood that those laws would be erroneously enforced against them was even slimmer. *Id.* at 34a, 60a-61a.[5]

3. The Sixth Circuit affirmed the dismissal of both SBA List's and COAST's suits, agreeing that they were unripe without separately considering the plaintiffs' standing. *Id.* at 18a. The court held that SBA List's claim was not ripe because it "has not shown that it labors under an imminent threat of prosecution by the Commission." *Id.* at 12a-13a; *see also id.* at 12a (stating that there was no evidence that "the Commission will threaten SBA List with prosecution anytime soon"). The court downplayed the significance of the Commission's probable cause determination against SBA List, because the Commission never actually found that SBA List violated §§ 3517.21(B)(9) or (B)(10). *Id.* at 10a. The

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[5] Based on essentially similar reasoning, the court also concluded that sovereign immunity under the Eleventh Amendment prevented it from exercising jurisdiction over SBA List's claims against Ohio Secretary of State Jon Husted. Pet. App. 38a.

Commission's "preliminary assessment that a violation *may* have occurred" does not "establish the threat of future harm" to SBA List. *Id.* at 12a.

Moreover, the Commission cannot act unless someone files a complaint, and the court declined to find that SBA List was at risk of being targeted in the future by "some citizen in Ohio who supports Obama." *Id.* at 12a. And there was no reason to believe that either Secretary of State Husted, who never had filed a complaint against SBA List, or Driehaus, who had withdrawn his complaint, lost re-election to Congress, and moved to Africa, were likely to file any complaints against SBA List based on its future communications. *Id.* at 13a-14a.

The court also emphasized that SBA List did not allege that it intended to violate Ohio Rev. Code §§ 3517.21(B)(9) or (B)(10) in the future. *Id.* at 15a. Rather, SBA List contended that it wished to make truthful statements concerning the Affordable Care Act's provisions concerning abortions. *Id.* Thus, SBA List could not establish that it faced a substantially likely "risk of a false prosecution." *Id.* Overall, the court declined to speculate about what exactly SBA List would say, the "veracity" of its "as-yet unarticulated statement," the likelihood that someone would file a complaint about it, and the odds that the Commission would conclude that the statement violated Ohio law. *Id.* at 15a-16a. Finally, noting that Driehaus had failed to intimidate SBA List into silence about his vote for the Affordable Care Act and its abortion-related provisions, the

court held that there was no evidence that SBA List's speech had been chilled. *Id.* at 17a-18a.

The court then went on to hold that COAST's fear of prosecution was "even more speculative than SBA List's," and affirmed the dismissal of its claims as well. *Id.* at 18a. The Sixth Circuit refused to rehear the case en banc. *Id.* at 65a.

SUMMARY OF ARGUMENT

SBA List and COAST have asserted justiciable claims that Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10) violate the First Amendment.

Sections 3517.21(B)(9) and (B)(10) prohibit a person from knowingly or recklessly making certain types of false statements about candidates running for public office. Ohio law permits any person to file a complaint with the Commission alleging that a speaker violated one of these provisions. When such a complaint is filed, the speaker faces the prospect of multiple hearings before the Commission and its panels, may be investigated by a Commission attorney, and can be required to produce documents in response to administrative subpoenas. If the Commission ultimately determines that the speaker broke the law, it may refer the case to a prosecutor, who may choose to commence criminal proceedings.

The First Amendment protects speakers—particularly those wishing to speak about politics, public affairs, and candidates for public office—not only against direct criminal prohibitions on their

speech, such as those §§ 3517.21(B)(9) and (B)(10) impose, but also "substantial burdens" that can have a chilling effect on public discourse. SBA List and COAST may challenge the constitutionality of §§ 3517.21(B)(9) and (B)(10) because those provisions pose a realistic risk of imposing substantial burdens on their political expression.

SBA List and COAST are active participants in the political process and regularly engage in controversial speech concerning the candidates they support or oppose. It is virtually inevitable that at least one person in the state will (again) conclude that a statement in one of their advertisements is false and file a complaint against them. SBA List and COAST therefore face the realistic prospect of enduring hearings before the Commission and its panels, providing internal documents in response to subpoenas, and being investigated by a Commission attorney. Even assuming that the ultimate prospect of SBA List or COAST being prosecuted or convicted is slim, the cost, burden, intrusiveness, and expense of these administrative proceedings are a substantial burden on them that reasonably can be expected to deter free and robust political expression. Because SBA List and COAST face the realistic prospect of such substantial burdens simply for engaging in political speech, they have standing to challenge the constitutionality of the underlying prohibitions, §§ 3517.21(B)(9) and (B)(10).

Moreover, the speech at issue in this case deals with elections. This Court should adopt the broad justiciability requirements that the D.C. Circuit

embraced for election-related cases in *Shays v. Federal Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005). That court held that a person or entity actively competing in the electoral process has standing to challenge allegedly invalid legal provisions which "distort[ ]" or "fundamentally alter the environment" or "overall rules" in which the election is being conducted. *Id.* at 85, 86. A party can establish standing by showing that it must "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Id.* at 86.

PACs such as SBA List and COAST compete against their ideological counterparts to raise money, persuade the electorate, and attempt to facilitate the election of candidates who share their vision of the public good. Laws such as §§ 3517.21(B)(9) and (B)(10) require them to "adjust their campaign strategy" to "account for" the omnipresent, yet reasonable, possibility that someone will file a complaint based on their political communications. *Id.* at 86-87. SBA List and COAST therefore have standing to ensure that the electoral system in which they actively participate and compete complies with the First Amendment.

More broadly, practical reasons exist for applying Article III's justiciability requirements liberally to election-related cases such as this. Resolving challenges outside the context of an impending election allows courts to avoid the need for truncated briefing schedules, limited discovery, expedited hearings, and constraints on the time available for

judicial reflection and decision making. Determining the validity of the rules governing elections well in advance of an election also avoids the possible due process concerns that might arise from a last-minute change in the governing legal standards.

Applying justiciability requirements broadly in election cases also permits courts to resolve potentially controversial disputes under something of a "veil of ignorance," because a particular candidate or political party may not stand to immediately benefit. This may not only help the judge herself rule fairly, but contribute to the perceived legitimacy of the court's ruling, by preventing any public perception (however inaccurate) that the court's action might have been influenced, even subconsciously, by political or partisan considerations. Finally, because elections are essentially adversarial contests between opposing candidates and the groups and voters that support them, broad justiciability rules are necessary to allow both sides equal access to the courts to ensure that the applicable legal rules are both valid and fairly enforced.

ARGUMENT

I. PETITIONERS' CLAIMS ARE JUSTICIABLE BECAUSE SPEAKERS FACE THE REALISTIC RISK OF INVESTIGATIONS, SUBPOENAS, AND ADMINISTRATIVE PROCEEDINGS CONCERNING THE TRUTHFULNESS OF THEIR POLITICAL SPEECH.

SBA List and COAST brought justiciable challenges to the constitutionality of Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10), because they have a fundamental constitutional right to engage in political speech without facing the omnipresent threat of having to defend the validity of their speech before either a government administrative tribunal or a criminal court. Because the Sixth Circuit failed to recognize the complete range of ways in which §§ 3517.21(B)(9) and (B)(10) burden fundamental First Amendment rights, it adopted an erroneously narrow view of the types of plaintiffs who have standing to challenge those provisions.

The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). One of its "major purpose[s]" is "to protect the free discussion of governmental affairs," including "discussions of candidates" and "the manner in which government is operated or should be operated." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The First Amendment generally prohibits not only direct restrictions on

political expression, *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (invalidating criminal prohibition on flag burning), but also other types of "substantial[] burdens" on "protected political speech," *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. ___, 131 S. Ct. 2806, 2833 (2011); *see, e.g.*, *Davis v. FEC*, 554 U.S. 724, 740 (2008) ("Because § 319(a) imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech," it must be subject to strict scrutiny and invalidated). "[C]onstitutional violations may arise from the deterrent, or 'chilling' effect of government regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *see also Dickerson v. United States*, 530 U.S. 428, 459 (2000) (Scalia, J., dissenting) (recognizing that "the importation of 'chill'" on political speech through such burdens "[i]s *itself* a violation of the First Amendment") (emphasis in original).

Sections 3517.21(B)(9) and (B)(10) raise First Amendment concerns in both ways. First, they impose criminal penalties for political speech, Ohio Rev. Code § 3517.21(B)—the unconstitutionality of which Petitioners seek to establish in the underlying lawsuit. Second, they chill political speech by imposing substantial burdens on people who choose to speak out in heated races, by creating a realistic risk that they will be subject to the cost, invasiveness, and inconvenience of administrative hearings, investigations, and discovery. These substantial burdens, and the chilling effect on speech

they inevitably generate, give Petitioners standing to maintain their claims. The Sixth Circuit erroneously minimized these burdens in concluding that Petitioners' claims were unripe. *See, e.g.*, Pet. App. 12a, 15a.

1. "Speech can be chilled and punished by administrative action as much as by judicial processes." *Waters v. Churchill*, 511 U.S. 661, 669 (1994). Under Ohio law, when a person engages in political speech about a candidate or public official, "any person" may file a complaint with the Commission, triggering administrative proceedings. Ohio Rev. Code § 3517.153(A). A panel will hold a hearing to determine whether probable cause exists to believe that the speaker violated Ohio law. *Id.* § 3517.156(A). Even before the panel makes such a probable cause determination, the speaker faces the possibility of an intrusive investigation by an "investigatory attorney" into his statements, his knowledge at the time he made them, and his intent or motives. *See id.* §§ 3517.21(B) (establishing *mens rea* and intent requirements), 3517.156(C)(3) (authorizing probable cause investigation by attorney).

If the panel determines that probable cause exists and refers the matter to the Commission, the Commission itself may decide to have an attorney conduct an investigation, *id.* § 3517.155(B), and issue subpoenas requiring the speaker to produce any personal papers concerning his statements, beliefs, and intent, *id.* § 3517.153(B). As this Court has recognized, "[U]nduly burdensome disclosure

requirements offend the First Amendment by chilling protected speech." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). Following yet another hearing, the Commission will decide whether to refer the speaker's statements to a prosecutor. *Id.* § 3517.155(A)(1)(c). The speaker, of course, must "bear the costs of litigation" throughout this entire process, which "might well . . . encourage [her] to cease engaging in certain types of [expression]." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 (1988).

Thus, the mere act of engaging in political expression creates a realistic possibility that a person will have to defend himself, provide discovery of personal papers, and cooperate with investigations by a state administrative body—to say nothing of the possibility of subsequent prosecution. These substantial burdens chill and deter the exercise of fundamental First Amendment rights, particularly by individuals. "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation" before the Commission and its panels, "will choose simply to abstain from protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *accord Citizens United v. FEC*, 558 U.S. 310, 335 (2010); *see also Riley*, 487 U.S. at 794. "Knowledgeable persons should be free to participate in [public] debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore . . . a matter of great importance." *Nike, Inc. v. Kasky*,

539 U.S. 654, 664 (2003) (Stevens, J., concurring in dismissal of certiorari).

The Sixth Circuit minimizes the likelihood that any of these contingencies will befall SBA List or COAST if they engage in future political communications about the Affordable Care Act or the politicians who supported it. Pet App. 12a. The court emphasizes that none of these events can occur unless "'some citizen in Ohio who supports Obama'" chooses to file (another) complaint against SBA List or COAST. *Id.* Given the level of discord, distrust, and vitriol in modern politics, fed by media trackers, political blogs, and the 24-hour news cycle, a person or group taking a stand on a controversial issue would be foolhardy to *not* expect some sort of retaliation of this nature. Particularly with the way that senior political leaders and even White House officials have vilified those who oppose them—labeling them terrorists,[6] arsonists,[7] anarchists,[8]

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[6] *See* Zeke J. Miller, *Obama Senior Adviser Compares Republicans to Terrorists*, TIME (Sept. 26, 2013) (statement of White House Senior Advisor Jim Pfeiffer) (explaining that President Obama would not negotiate with congressional Republicans because he is not for "negotiating with people with a bomb strapped to their chest"), *available at* http://tinyurl.com/k7rq6sa; Tal Kopan, *Gore: Shutdown "Political Terrorism,"* POLITICO (Sept. 27, 2013), (statement of former Vice President Al Gore) (stating, in reference to the government shutdown, "I think the only phrase that describes it is political terrorism. 'Nice global economy you got there, be a shame if we had to destroy it.'"), *available at* http://tinyurl.com/pu7ele9; *see also* Jonathan Allen & John Bresnahan, *Sources: Joe Biden Likened Tea Partiers to Terrorists*, POLITICO (Aug. 1, 2011), *available at* http://tinyurl.com/3qy9ght.

racists, and Neanderthals[9]—conservative groups justifiably can feel even more vulnerable to retaliation for promoting their beliefs in limited government, balanced budgets, and personal freedom.

In short, Ohio law makes it extremely easy for people to attempt to shut their opponents out of the political marketplace through a burdensome and intrusive administrative process, rather than engage them with the force of their ideas. Active participants in the political process such as SBA List and COAST therefore have standing to challenge Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10).

2. The likelihood that political speakers will face substantial burdens from Commission investigations, subpoenas, and proceedings is enhanced by the Commission's long history of readily declaring

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[7] State of the Union (CNN television broadcast Sept. 22, 2013) (statement of House Minority Leader Nancy Pelosi) ("But for many of them [House Republicans], I call them legislative arsonists. They're there to burn down what we should be building . . . ."), *available at* available at http://tinyurl.com/p6r8uae.

[8] CNN Newsroom (CNN television broadcast Oct. 4, 2013) (statement of Senate Majority Leader Harry Reid) (calling members of the Tea Party "anarchists" who "don't believe in government at any level"), *available at* http://tinyurl.com/lrjvt4p.

[9] Jennifer Epstein, *Biden: "Neanderthal Crowd" Slowed VAWA Renewal*, POLITICO (Sept. 12, 2013) (statement of Vice President Joe Biden), *available at* http://tinyurl.com/kqsnymx.

political speech to be false, or at least concluding that probable cause exists to conclude that it is false. The sweeping breadth with which the Commission enforces §§ 3517.21(B)(9) and (B)(10) exacerbates their chilling effect.

The Commission punctiliously subjects political communications to exacting standards, scrupulously parsing every word and phrase to uncover misplaced modifiers, imprecise phrasing, and unsupported overstatements. For example, in *Ohio Democratic Party v. Ohio Elections Comm'n*, No. 07AP-876, 2008 Ohio App. LEXIS 3553 (Ohio App. Aug. 21, 2008), the Commission concluded, and Ohio courts agreed, that a campaign advertisement violated the Political Speech Prohibitions because:

> instead of indicating that Sherrod Brown was seeking the office of "U.S. Senator," below his name is "U.S. Senate." In addition, instead of indicating that Ben Espy and Bill O'Neill were both seeking the office of "Justice," below each of their names is "Supreme Court." At the time the flyer was distributed, none of the Democratic candidates held the office that was being sought in the election.

Id. at *4; *see also Walter v. Cincione*, No. C-2-00-1070, 2000 U.S. Dist. LEXIS 23160, at *2, *13-14 (S.D. Ohio Oct. 6, 2000) (noting that the Commission found probable cause to believe that a candidate had violated § 3517.21(B)(10) by using the label "Independent Democrat" on his campaign materials, even though he was a registered Democrat running

as an independent, since he had not received the Democratic Party's nomination).

Similarly, in *Team Working for You v. State Elections Comm'n*, 754 N.E.2d 273, 276 (Ohio App. 2001), the Commission found that several candidates had violated § 3517.21(B)(10) by running an advertisement declaring that one of their opponents "is currently campaigning against industrial growth and overdevelopment in [the municipality of] Macedonia." The Commission concluded that the word "currently" was false because the opponent had made the statements upon which the advertisement was based two years earlier. *Id.* at 279. It also found fault with the rest of the advertisement because, after reviewing the opponent's public statements, it concluded that she "was not opposed to growth," but simply "did not favor growth supported by taxpayers through tax abatements." *Id.*

Indeed, the Commission has found statements to be false simply because they did not reveal enough details that the Commission believed to be relevant. In *Comm. to Elect Straus Prosecutor v. Ohio Elections Comm'n*, No. 07AP-12, 2007 Ohio App. LEXIS 4797 (Ohio App. 2007), a candidate in a race for prosecutor ran an advertisement attacking the way in which the incumbent's office had handled a number of cases. Among other things, the advertisement claimed that, in a particular drug prosecution, "the case against the ringleader later plea bargained to 7 months time served. No prison time." *Id.* at *2. The Commission found, and Ohio courts agreed, that the statement violated § 3517.21(B)(10), even though the defendant

had entered into a plea bargain and received a sentence of only 7 months, because the prosecutor's office had argued in favor of a higher sentence. *Id.* at *16-18.

Other findings by the Commission that the Political Speech Prohibitions were violated have been overturned by Ohio courts. *See, e.g., Flannery v. Ohio Election Comm'n*, 804 N.E.2d 1032, 1034 (Ohio App. 2004) (overturning Commission's conclusion that a candidate violated the Political Speech Prohibitions by claiming that his opponent, the incumbent Secretary of State, had acted "akin to an election official handing a person a ballot and saying, 'Vote for [the opponent],'" by posting official signs bearing his name at polling places to caution against voter fraud); *SEIU Dist. 1199 v. Ohio Elections Comm'n*, 822 N.E.2d 424, 430, 432 (Ohio App. 2004) (overturning Commission's conclusion that a union violated Ohio's Political Speech Prohibitions by claiming that a proposed tax levy would increase property taxes by 60%, because its advertisements failed to specify that only the health-and-human-services property tax levy, and not other property taxes, would increase).

Thus, the Commission's own history of interpreting and applying Ohio's Political Speech Prohibitions, including § 3517.21(B)(10), further increases the chances of a speaker being subject to burdensome, costly, and invasive administrative proceedings, investigations, and subpoenas.

3. The Sixth Circuit held that SBA List's and COAST's challenges to §§ 3517.21(B)(9) and (B)(10) were not ripe. It placed great weight on the fact that Petitioners did not allege that they intended to violate those statutes, but rather insisted that their intended speech was true and accurate. Pet. App. at 15a. The court claimed that "the fear animating [Petitioners'] request for prospective relief" is therefore "the risk of a false prosecution," and such risk is "exceedingly slim." *Id.*; *see also id.* at 10a (claiming that SBA List and COAST cannot show "an imminent threat of prosecution").

The Sixth Circuit further noted that numerous procedural barriers to prosecution exist. SBA List and COAST cannot be prosecuted for making a statement—particularly a truthful statement—unless someone files a complaint; a panel finds probable cause to conclude the statement violates Ohio law; the Commission ultimately concludes by clear and convincing evidence that the statement does violate Ohio law (despite its actual truthfulness); and it decides to refer the matter for prosecution. *See id.* at 12a, 15a-16a.

The Sixth Circuit's exclusive emphasis on the ultimate likelihood of prosecution for SBA List and COAST is erroneous, ignoring the both the full scope of protection that the First Amendment guarantees to political speakers and the burdens of the very administrative process it discusses. *Cf. Laird v. Tatum*, 408 U.S. 1, 11 (1972) (recognizing that speech may be impermissibly chilled by measures short of prosecution); *Ariz. Free Enter. Club's Freedom Club*

PAC v. Bennett, 564 U.S. ___, 131 S. Ct. 2806, 2813 (2011) (holding that "substantial burdens" on speech other than direct prohibitions violate the First Amendment). Administrative proceedings, investigations, and discovery can be just as burdensome and chilling as a prosecution. *See Waters v. Churchill*, 511 U.S. 661, 669 (1994). SBA List and COAST have the fundamental First Amendment right to engage in political expression concerning candidates for public office without facing the realistic possibility of suffering the expense, inconvenience, intrusiveness, and governmental scrutiny that arises from the Commission's procedures. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Thus, Petitioners' claims—particularly their facial challenges to §§ 3519.21(B)(9) and (B)(10)—are justiciable.

4. While political discourse has thankfully evolved since the days of Vice President Aaron Burr and Alexander Hamilton[10]—and even progressed past the era of Senator Charles Sumner and Representative Preston Brooks[11]—lies, baseless assertions, exaggerations, hyperbole, and invective remain unfortunate parts of it. President Barack Obama

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[10] *See* U.S. Senate Historical Office, *March 2, 1805: Indicted Vice President Bids Senate Farewell*, *available at* http://tinyurl.com/m3rjjv3.

[11] *See* U.S. Senate Historical Office, *May 22, 1856: The Caning of Senator Charles Sumner*, *available at* http://tinyurl.com/nxz56hn.

himself uttered one of the most significant false statements in modern American political history:

> [N]o matter how we reform health care, we will keep this promise: If you like your doctor, you will be able to keep your doctor. Period. If you like your health care plan, you will be able to keep your health care plan. Period. No one will take it away. No matter what.[12]

Similarly, during the 2012 election cycle, Senator Majority Leader Harry Reid falsely declared, "So, the word's out that [Governor Mitt Romney] hasn't paid any taxes for 10 years. Let him prove that he has paid taxes, because he hasn't."[13]

The solution to such falsehoods lies not in administrative or criminal proceedings, detailed inquiries by "investigatory attorneys," or voluminous discovery requests, but rather in more speech. As Justice Brandeis memorably declared, in words that history has vindicated:

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[12] Mary Lu Carnevale, *Obama: "If You Like Your Doctor, You Can Keep Your Doctor,"* WALL ST. J. WASH. WIRE (June 15, 2009), *available at* http://tinyurl.com/mvlz5h; *cf.* Angie Drobnic Holan, *Lie of the Year: "If You Like Your Health Care Plan, You Can Keep It,"* TAMPA BAY TIMES POLITIFACT.COM (Dec. 12, 2013), *available at* http://tinyurl.com/pu7xtl4.

[13] Niels Lesniewski, *Harry Reid Again Accuses Mitt Romney of Failing to Pay Taxes*, ROLL CALL (Aug. 2, 2012), *available at* http://tinyurl.com/n7dgl39; *cf.* Glenn Kessler, *Four Pinocchios for Harry Reid's Claim About Mitt Romney's Taxes*, WASH. POST FACT CHECKER (Aug. 7, 2012), *available at* http://tinyurl.com/cn7f2yl.

> Those who won our independence by revolution were not cowards. . . . They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *accord United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012); *Meese v. Keene*, 481 U.S. 465, 481 (1987).

Ohio law casts a chilling pall over political discourse, imposing a very real risk of substantial burdens—to say nothing of possible criminal prosecution—on those individuals, candidates, and groups who would dare to publicly engage in political dialogue. Article III therefore permits SBA List and COAST to challenge §§ 3517.21(B)(9) and (B)(10).

II. THIS COURT SHOULD APPLY JUSTICIABILITY REQUIREMENTS LIBERALLY IN THIS CASE BECAUSE THE CHALLENGED LAWS RELATE TO ELECTIONS

This Court should apply Article III's standing requirements broadly in this case, since it deals with an election-related statute. Many scholars have pointed out that courts during the Founding Era did not apply consistent, strict justiciability requirements. *See, e.g.*, Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 66-67 (2008) ("[T]he Supreme Court's opinions over the nation's first 150 years [show] that direct injury was not a necessary element of a 'case' or 'controversy.'"); Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEMPHIS L. REV. 727, 735 (2009) ("American Framing-era courts commonly entertained cases that would flunk the Supreme Court's modern standing requirements."). This is especially true for disputes that qualified as "cases" rather than "controversies" under Article III. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of the Federal Courts*, 69 NOTRE DAME L. REV. 447, 449-50 (1994) (explaining that early federal courts would exercise jurisdiction over disputes that qualified as "cases" under Article III, regardless of whether they would have met modern justiciability requirements). Thus, this Court has the authority to determine how strictly to apply Article III's justiciability requirements to this case.

Many of the nation's leading legal scholars have argued that, while traditional standing requirements apply most readily to purely private disputes between litigants that primarily center around disagreements of historical fact, this Court should relax standing requirements in "public law" cases involving government entities, where important public values are at stake. *See, e.g.*, Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 24 (1982); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 317 (1990); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 630-32, 642-43 (1983); *see also* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1978). The Court need not go so far, however, to recognize that the unique context of elections counsels that justiciability requirements be applied very forgivingly to determine whether litigants may challenge or seek enforcement of the statutes and regulations relating to that process.

1. The D.C. Circuit's ruling in *Shays v. Federal Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005), provides a persuasive model for how this Court's justiciability requirements should be applied in election-related cases. The plaintiffs were Members of the House of Representatives who had sponsored the Bipartisan Campaign Finance Reform Act ("BCRA") of 2002, Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002), which imposed stricter limits on "soft money" contributions and issue advertisements. *Shays*, 414 F.3d at 79. They sued the FEC, contending that its regulations did not enforce BCRA's requirements strictly enough, and even

permitted some of the practices that Congress had sought to prevent. *Id.*

The D.C. Circuit recognized that the plaintiffs had to establish "injury in fact," causation, and redressability to establish their standing to challenge the FEC's BCRA regulations. *Id.* at 83 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)). The plaintiffs alleged that they satisfied these requirements because the regulations created the "'strong risk'" that their opponents would use "BCRA-banned advertising" and "soft money spending" against them. *Id.* at 85. Moreover, the plaintiffs argued that the regulations forced them to campaign "in an environment rife with practices Congress has proscribed." *Id.*

The D.C. Circuit agreed, holding that "illegal structuring of a competitive environment injures those who are regulated in that environment" and is "sufficient to support Article III standing." *Id.* It explained that participants in such an environment may challenge legal provisions that create "distortions that alter the competitive environment's overall rules." *Id.* at 86; *see also id.* at 85 ("[R]egulated litigants suffer legal injury when agencies set the rules of the game in violation of statutory directives.").

The plaintiffs met these standards because the FEC's regulations compelled them to "compete for office in contests tainted by BCRA-banned practices."

Id. They had to "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Id.* at 86. Thus, because the FEC's regulations "fundamentally alter[ed] the environment" in which the election was being conducted, participants who had to "adjust their campaign strategy" to "account for" activities permitted by the regulations had standing to challenge them. *Id.* at 86-87. The court went on to hold that participants in the electoral process could challenge the allegedly invalid regulations so long as there was a "'distinct risk'" that others would take advantage of them, *id.* at 92 (quoting *Fla. Audobon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc)) without having to "wait[] for specific competitors" to actually do so, *id.* at 90.

PACs such as SBA List and COAST are integral players in the electoral process. Federal law defines the term "political committee" broadly enough to refer to almost any group of people wishing to band together to move the electorate and influence public policy on a particular issue. 2 U.S.C. § 431(4).

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena . . . . The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus

> on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

Citizens Against Rent Cont./Coal. for Fair Hous. v. Berkeley, 454 U.S. 290, 294 (1981); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."); *Buckley v. Valeo*, 424 U.S. 1, 24, 65-66 (1976).

PACs compete against their ideological counterparts to raise money, persuade the electorate, and facilitate the election of candidates who share their vision of the public good. They help move issues onto the public agenda; hold candidates accountable for their public statements, proposed policies, and voting records; and craft messages intended to galvanize the electorate. Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10) are responsible for "fundamentally alter[ing]" and "illegal[ly] restructuring" the competitive electoral environment in which PACs operate, *Shays*, 414 F.3d at 85-86, by allowing any speaker to be subjected to administrative hearings, subpoenas, investigations, and even criminal prosecution for engaging in speech that the government determines is recklessly or knowingly false.

Active participants in the electoral process such as SBA List and COAST must "adjust their campaign strategy" to "account for" the omnipresent, yet

reasonable, possibility that someone will file a complaint based on a powerful, persuasive advertisements that may be seen as taking advocacy a step too far. *Cf. Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]ords are often chosen as much for their emotive as their cognitive force."). This Court should recognize their standing to demand a judicial determination of whether the State of Ohio has "set the rules of the game in violation of [constitutional] directives." *Shays*, 414 F.3d at 85.

2. Numerous other practical considerations bolster the desirability of applying Article III's justiciability requirements to allow election-related disputes such as this to be brought well outside the context of an ongoing election. When disputes arise in the weeks or even months before an election—which is the only time that allegedly false statements about a candidate for office can violate the Political Speech Prohibitions, *see* Ohio Rev. Code § 3517.21(B) (prohibiting false statements made "during the course of any campaign for nomination or election")—they often must be resolved on an expedited basis with truncated briefing schedules, limited if any discovery, expedited hearings, and relatively little time for judicial reflection. *See, e.g., Dep't of Comm. v. Montana*, 503 U.S. 442, 445 (1992) ("In view of the importance of the issue and its significance in this year's congressional and Presidential elections, we noted probable jurisdiction and ordered expedited briefing and argument."); *cf. Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). This Court should apply justiciability rules so as to allow disputes concerning election laws to be resolved along a more sensible

timetable, whenever reasonably possible, to allow for better and more accurate decision making by all levels of courts.

Due process concerns can arise when the rules governing an election are changed at or near the last minute. *See Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 73 (2000) (per curiam) (discussing grant of certiorari concerning "whether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated the Due Process Clause"); *Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995). The intended effect of laws such as Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10) is to curtail the range of issues, themes, messages, and strategies that may be used by political candidates and the PACs that support them. Determining the constitutionality of these provisions well in advance of an election is far preferable to altering such substantial limits on public discourse at the last minute, potentially altering the contours of a race by judicial fiat.

Allowing disputes concerning election-related legal provisions to be adjudicated outside the context of an impending election also may contribute to fairer decision making, and certainly promote the public appearance of fairer decision making. In cases such as this, where a particular candidate or party does not stand to benefit or be disadvantaged in an impending election, and a ruling will not tend to systematically benefit or disadvantage either party, judges effectively enjoy the benefit of a Rawlsian "veil of ignorance." *See* John Rawls, A Theory of Justice

12, 136-42 (1971). Allowing courts to decide cases concerning the electoral process under circumstances where the ultimate beneficiaries in future elections are indeterminate or unclear helps prevent judges' potentially subconscious biases or preferences from inadvertently coloring their perception of the issues. *Id.* at 136. It also enhances the likely public legitimacy of the court's ruling, by preventing the perception (even if inaccurate or unfair) that it might have been influenced, even unknowingly, by political or partisan considerations. *Cf.* Code of Conduct for United States Judges, Canon 2(B) (Rev. ed. July 1, 2009) ("A judge should not allow . . . political . . . relationships to influence judicial conduct or judgment."). In election-related cases, the judiciary might best promote its legitimacy by avoiding Bickel's passive virtues. *Cf.* Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 70-71, 117-18, 205-07 (1962).

Finally, when applying justiciability principles to cases concerning the electoral process, the court should consider the fact that election laws do not simply regulate the conduct of private actors or government officials in the conventional sense. Rather, election laws establish a fundamentally adversarial process between the opposing candidates, parties, and the groups and voters that support them. If that process is to be fair, and the will of The People accurately determined in accordance with law, participants on both sides must have the ability to demand and compel compliance with all applicable legal provisions, and seek the invalidation of unconstitutional or otherwise invalid provisions.

Using strict standing requirements or other high procedural hurdles to prevent certain participants in the electoral process from ensuring that applicable constitutional, statutory, and regulatory requirements are enforced will result in one side enjoying an unfairly greater degree of access to the courts, and the applicability of the rules resting with potentially partisan election officials, thereby undermining both the rule of law and the integrity of the electoral process. *See, e.g.*, *Brunner v. Ohio Republican Party*, 555 U.S. 5, 5-6 (2008) (per curiam) (holding that plaintiffs lacked a private right of action to compel the Ohio Secretary of State to comply with a federal law requiring her to ensure the accuracy of the State's voter registration rolls by comparing them to state motor vehicle records); *Townley v. Miller*, 722 F.3d 1128, 1131 (9th Cir. 2013) (holding that the plaintiff voters, candidates, and political party lacked standing to argue that the Constitution and federal law required that "None of These Candidates" be excluded as an option on the ballot, because state law prohibited votes cast for that option from being given any legal effect), *cert. denied* 82 U.S.L.W. 3404 (Jan. 13, 2014); *League of Women Voters of Florida v. Detzner*, 283 F.R.D. 687, 688 (N.D. Fla. 2012) (allowing voters' groups to challenge the constitutionality of statutory safeguards on third-party registration drives, while holding that other voters lacked standing to intervene to defend those laws after the State refused to do so and sought to negotiate a settlement). Thus, this Court should apply Article III's standing requirements liberally in lawsuits centering around

laws relating to the electoral process such as Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10).

CONCLUSION

For the foregoing reasons, Petitioners have asserted justiciable constitutional challenges to Ohio Rev. Code §§ 3517.21(B)(9) and (B)(10) and the Commission's procedures. This Court should reverse the judgment of the U.S. Court of Appeals for the Sixth Circuit and reinstate their lawsuit.

Respectfully submitted,

MICHAEL T. MORLEY*
223 Pawnee Road
Cranford, N.J. 07016
(860) 778-3883
michaelmorleyesq@
hotmail.com
**Counsel of Record*

JOHN PHILLIPPE
Chief Counsel
Republican National
Committee
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8500

Counsel for Amicus Curiae
Republican National
Committee

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The
Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING PETITIONERS

SHANNON LEE GOESSLING
Counsel of Record
KIMBERLY STEWART HERMANN
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Road, Suite 320
Marietta, Georgia 30062
(770) 977-2131
shannon@southeasternlegal.org

Counsel for Amicus Curiae

February 28, 2014

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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II. The Sixth Circuit's refusal to hear Petitioners' pre-enforcement challenge to Ohio's statutes proscribing certain political speech effectively bans political speech and muzzles the very agencies our Founding Fathers thoughtfully and deliberately selected to keep our society free 6

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court.

SLF has an abiding interest in the protection of the freedoms set forth in the First Amendment – namely the freedom of speech. From a public interest perspective, SLF asserts that this Court's jurisprudence regarding pre-enforcement challenges of speech-suppressive laws requires courts to hear such challenges – especially when the law suppresses free discussion and debate on public issues which are vital to America's civil and political institutions. SLF is profoundly committed to the protection of American legal heritage, including the freedom of speech, a vital component to its system of laws.

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[1] Pursuant to this Court's Rule 37.6, SLF hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.

SUMMARY OF ARGUMENT

The freedom to publicly speak on political issues, especially those arising during elections, is critical to a functioning democracy. The First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Thus, it is imperative that if the government attempts to suppress political speech, Americans have the ability to protect their freedom of speech by challenging the constitutionality of such laws.

This Court has consistently held that a plaintiff does not need to expose himself to arrest or prosecution before challenging the constitutionality of a speech-suppressive law. To do otherwise, would turn respect for the law on its head and force law-abiding Americans into self-censorship. Ignoring this Court's jurisprudence, the Sixth Circuit has refused to hear pre-enforcement challenges to the constitutionality of laws suppressing political speech unless the challengers first incriminate themselves or are convicted of violating the law. The Sixth Circuit's approach abridges the freedom of speech and suppresses open discussion of governmental affairs and debate on public issues, both of which are vital to America's civil and political institutions.

To ensure the government does not violate the Constitution through forced self-censorship, and to prevent it from robbing Americans of their freedom to fully participate in the political process, this Court

should reverse the Sixth Circuit's decision and reaffirm its well-settled precedent regarding standing to bring pre-enforcement challenges.

ARGUMENT

I. The Sixth Circuit's refusal to hear pre-enforcement challenges to the constitutionality of speech-suppressive laws forces self-censorship and chills speech.

This Court has consistently recognized that constitutional challenges based on the First Amendment present unique standing considerations. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 299-302 (1979); *see also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (permitting a pre-enforcement First Amendment challenge, recognizing the "sensitive nature of constitutionally protected expression"). As Justice Brandeis explained in his famous *Whitney v. California* concurrence, "[i]t is therefore always open to Americans to challenge a law abridging free speech and assembly. . . ." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Nowhere is this more true than when a law criminalizes speech and a person must choose between either committing a crime or self-censorship. If that person violates a speech-suppressive law by partaking in the criminalized speech and is convicted, he indisputably has standing to challenge the law's

constitutionality.[2] While some may characterize that person as brave and fearless, presumably, a majority of Americans are unwilling to face potential incarceration to express their views.

Recognizing this Catch-22, the Court has held that a plaintiff does not need to first expose himself to arrest or prosecution to raise a First Amendment challenge. *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (first holding that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *see Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding that while the plaintiff had not been arrested for violating the contested law, he had standing to challenge the law because he claimed that it deterred his constitutional

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[2] The basic inquiry made to determine whether a party has alleged a case or controversy within the meaning of Article III of the Constitution, "is whether the conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt*, 442 U.S. at 297-98 (internal quotations omitted). Thus, where a party is arrested, prosecuted or convicted, the dispute and injury is definite and concrete. *See generally, e.g., United States v. Alvarez*, 132 S. Ct. 2537 (2012) (justiciable First Amendment challenge where plaintiff was charged with violating the Stolen Valor Act); *Mills v. Alabama*, 384 U.S. 214 (1966) (justiciable First Amendment challenge to a state law criminalizing certain campaign speech where plaintiff was charged with violating law); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (justiciable First Amendment challenge to a criminal defamation law where plaintiff was tried and convicted).

rights). Instead, a person may hold his tongue and challenge the statute now, for the harm of self-censorship is a harm that can be realized even without an actual prosecution. *See Am. Booksellers Ass'n*, 484 U.S. at 392-93 (finding that plaintiffs had standing to challenge the constitutionality of a criminal statute prohibiting the display of sexually explicit materials even though they had neither been charged nor convicted of the crime).

Without explanation, and contrary to seven other circuit courts,[3] the Sixth Circuit's approach to standing ignores this Court's well-settled precedent and refuses to hear suits that challenge the constitutionality of speech-suppressive criminal laws unless the plaintiff has been convicted. *See Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. 2013). Requiring a potential challenger to violate the law and even incriminate himself to presumably be convicted so that he can mount a constitutional challenge turns respect for the law on its head. *See Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003) (finding standing in a pre-enforcement challenge and explaining that to preclude the challenge violates public policy and penalizes plaintiff for its "commendable respect for the rule of law"). The result of the Sixth Circuit's approach is to rob Americans of any *lawful* ability to challenge

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[3] *See* Pet'r Br. at 19-21.

the constitutionality of speech-suppressive laws and force them into self-censorship.

II. The Sixth Circuit's refusal to hear Petitioners' pre-enforcement challenge to Ohio's statutes proscribing certain political speech effectively bans political speech and muzzles the very agencies our Founding Fathers thoughtfully and deliberately selected to keep our society free.

Unique standing considerations associated with the First Amendment are even more critical when, such as here, the criminal law that a party seeks to challenge suppresses political speech. The Sixth Circuit's refusal to hear Petitioners' pre-enforcement challenge to Ohio's statutes proscribing certain political speech directly contradicts the very agencies our Founding Fathers thoughtfully and deliberately selected to keep our society free. Self-censorship results from the Sixth Circuit's dismissal, chilling the very things that the civil and political institutions in our society depend on – free debate and free exchange of ideas – and, from a practical perspective, banning political speech.

Since 1724, freedom of speech has famously been referred to as the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, Cato's Letters: Essays on Liberty, Civil and Religious 99 (1724), reprinted in Jeffrey A. Smith, Printers and Press Freedom: The Ideology of Early American Journalism 25 (Oxford University Press 1988). Upon ratification, the First

Amendment "was understood as a response to the repression of speech and press that had existed in England." *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). Through the First Amendment, our Founding Fathers sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law, the argument of force in its worst form." *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

As this Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills*, 384 U.S at 218-19). This free discussion necessarily "includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Of these, the Court has observed that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.*, 401 U.S. at 272.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices

among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). In finding a state law regulating the content of permissible speech during a judicial campaign unconstitutional, this Court explained that "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party v. White*, 536 U.S. 765 (2002). In *Citizens United*, the Court took this a step further and reaffirmed the principle that "[p]olitical speech is indispensable to decisionmaking in democracy." 558 U.S. at 349 (internal quotations omitted).

By refusing to follow this Court's well-settled precedent and hear Petitioners' constitutional challenge to a law criminalizing certain speech, the Sixth Circuit censors political speech. Its approach to standing quashes "an essential mechanism to democracy" and robs Americans of their right to "inquire, to hear, to speak, and to use information to reach consensus" which this Court has found to be a "precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339-40.

III. To prevent forced self-censorship and ensure Americans can partake in open political discourse, this Court should reverse the Sixth Circuit's dismissal and reaffirm its settled precedent regarding justiciability standards applicable to pre-enforcement challenges of laws that effectively censor political speech.

Since it first articulated modern-day justiciability standards for pre-enforcement challenges in *Doe*, this Court has never required a party to be convicted before challenging the constitutionality of a criminal law. The Court has re-affirmed these standards time and time again, especially with respect to First Amendment challenges. *See, e.g., Am. Booksellers Ass'n*, 484 U.S. at 392-93; *Babbitt*, 442 U.S. at 299-302; *Dombrowski*, 380 U.S. at 486. "First Amendment standards, . . . must give the benefit of doubt to protecting rather than stifling speech." *Citizens United*, 558 U.S. at 327 (internal quotations omitted).

Circuit courts have applied these well-settled standards to pre-enforcement challenges of laws that seek to censor political speech and have consistently found such challenges justiciable. *See, e.g., St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006) (permitting pre-enforcement challenge of a campaign finance law even though plaintiffs did not violate law); *Arizona Right to Life PAC*, 320 F.3d at 1006-07 (permitting pre-enforcement review of a law limiting the time, place and manner of

distribution of political literature even though plaintiffs did not violate law); *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003) (permitting pre-enforcement challenge of criminal law regulating the content of election speech even though plaintiffs were never charged, let alone convicted of the crime); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000) (permitting pre-enforcement challenge of civil campaign finance laws justiciable even though no suit brought against plaintiffs). These courts recognize that to find otherwise would be to force self-censorship of political speech – rejecting exactly what the Sixth Circuit has done here.

The Sixth Circuit's decision should not be allowed to stand. Here, the threat of prosecution with no right to challenge prior to conviction is tantamount to forced censorship of citizens who wish to participate in political discourse. "Political speech must prevail against laws that would suppress it, whether by design or inadvertence," *Citizens*, 558 U.S. at 340. The Sixth Circuit's treatment of standing scares citizens, who would otherwise partake in political debate, into self-censorship. This Court's reversal of the Sixth Circuit and its re-affirmance of settled precedent regarding pre-enforcement challenges is imperative to protecting political speech and ensures that Americans will continue to be free to partake in the democratic process.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

SHANNON LEE GOESSLING
Counsel of Record
KIMBERLY STEWART HERMANN
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Road, Suite 320
Marietta, Georgia 30062
(770) 977-2131
shannon@southeasternlegal.org

Counsel for Amicus Curiae

February 28, 2014

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

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Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, AND JON HUSTED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* STUDENT PRESS LAW CENTER IN SUPPORT OF PETITIONERS

FRANK D. LOMONTE
STUDENT PRESS LAW CENTER
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-1904

THOMAS M. CLYDE
KILPATRICK TOWNSEND
& STOCKTON LLP
1100 Peachtree Street NE,
Suite 2800
Atlanta, GA 30309
(404) 815-6500

ADAM H. CHARNES
RICHARD D. DIETZ*
ELIZABETH L. WINTERS
KILPATRICK TOWNSEND
& STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300
rdietz@kilpatricktownsend.com

Attorneys for Amicus Curiae

**Counsel of Record*

252320

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QUESTIONS PRESENTED

1. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would certainly and successfully prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

2. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Student Press Law Center (SPLC) is a non-profit, non-partisan organization founded in 1974 with the mission of promoting youth involvement in civic life through journalism.

SPLC provides free educational materials and workshops to students across the country about their First Amendment rights, and its attorneys are the authors of the widely used reference text, *Law of the Student Press*.

SPLC regularly appears in this Court and other federal and state appellate courts to provide additional perspective and context as an advocate with many years of experience working directly with students whose rights to speak on matters of public concern have been suppressed by school or government officials.[1]

SUMMARY OF ARGUMENT

This Court has long held that plaintiffs need not wait for the government to enforce a speech-restrictive law before asserting a facial challenge under the First Amendment. So long as the plaintiffs allege an actual and well-founded fear that the law will be enforced against them, they have shown the existence of a justiciable controversy satisfying this Court's standing and ripeness requirements.

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1. Both Petitioners and Respondents submitted letters to the Court granting blanket consent to *amicus curiae* briefs in this case. In accordance with Supreme Court Rule 37.6, *amicus* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus* or its counsel.

These special justiciability rules are necessary in First Amendment cases because the government can use the fear of enforcement to chill speech and compel citizens to "self-censor" otherwise protected speech and expression. As a result, unless the government disavows a speech-restrictive law, any person whose speech is subject to that law has standing to assert a facial First Amendment challenge.

These standing and ripeness principles are vital to protecting student speech. The potential chilling effect of speech-restrictive laws and rules is especially powerful in the school setting because students are surrounded by authority figures and can be disciplined for their speech without the robust legal process available to ordinary citizens. As a result, students are particularly susceptible to the chilling effect of laws and school rules that burden their right to speak and express themselves.

In addition, students often find their meritorious First Amendment challenges mooted because they graduate and cease being subject to the speech-restrictive laws or school rules. The ability to assert pre-enforcement facial challenges to these laws is critical to provide meaningful opportunities for students to defend their First Amendment rights in the courts.

In sum, the Court should reject the Sixth Circuit's holding below and reaffirm that standing and ripeness principles are satisfied in a facial First Amendment challenge if the plaintiffs allege an actual, well-founded fear that the law will be enforced against them if they engage in their desired speech.

ARGUMENT

I. STANDING AND RIPENESS ARE SATISFIED IN FIRST AMENDMENT CASES IF THE PLAINTIFFS ALLEGE AN ACTUAL AND WELL-FOUNDED FEAR THAT THE SPEECH-RESTRICTIVE LAW WILL BE ENFORCED AGAINST THEM.

As this Court repeatedly has acknowledged, the government can suppress protected speech without actually prosecuting its citizens or otherwise taking action against them. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). It does so through laws that instill the *fear* of enforcement, thereby silencing those who might otherwise speak. The result is "self-censorship; a harm that can be realized even without an actual prosecution." *American Booksellers Ass'n*, 484 U.S. at 393.

To prevent the government from compelling citizens to "self-censor," this Court has long permitted plaintiffs to challenge laws on First Amendment grounds *before* any actual enforcement by the government (and, in fact, before they even engage in the desired speech). *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010); *American Booksellers Ass'n*, 484 U.S. at 393; *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301–03 (1979).

This rule reflects the importance of the First Amendment and the unique concern that the mere existence of speech-restrictive laws can have a "chilling

effect" on citizens' free speech and expression. As this Court has explained, First Amendment rights "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) ("The mere potential for the exercise of [the power to restrict speech] casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) ("[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.").

As a result, to satisfy standing and ripeness concerns in First Amendment cases, this Court has required only that plaintiffs "have alleged an actual and well-founded fear that the law will be enforced against them." *American Booksellers Ass'n*, 484 U.S. at 393. That allegation is sufficient to establish the risk of "chilling effects" and "self-censorship" and thus create a justiciable controversy under the First Amendment. *Id.* at 393. Importantly, the government cannot defeat standing in this type of pre-enforcement challenge simply by asserting that the plaintiffs ultimately would not have been prosecuted for their speech. To eliminate the danger of self-censorship, and thus eliminate the justiciable issue, the government must disavow the law altogether. *Id.*; *Babbitt*, 442 U.S. at 302.

The Sixth Circuit's holding below departed from this long-standing and straightforward doctrine, instead applying a lengthy, convoluted analysis that considered the likelihood that an enforcement action would be brought against Petitioners for their speech. (Pet. App. 6a-18a.) The Court should reject that analysis and reaffirm that standing and ripeness principles are satisfied in a facial First Amendment challenge to a speech-restrictive law if the plaintiffs allege an actual, well-founded fear that the law will be enforced against them and the government refuses to disavow the challenged law. *American Booksellers Ass'n*, 484 U.S. at 393.

II. THIS COURT'S STANDING AND RIPENESS RULES FOR PRE-ENFORCEMENT FACIAL CHALLENGES ARE VITAL TO PROTECTING STUDENTS' FIRST AMENDMENT RIGHTS.

This Court's First Amendment standing and ripeness precedent is vital to ensuring that students can exercise their First Amendment rights to speak on matters of public concern. Students operate under special First Amendment rules that, in the school setting, are less robust than those of ordinary citizens. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), this Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Nevertheless, the Court permitted school officials to suppress or punish student speech that would "materially and substantially interfere" with the operation of the school. *Id.* at 509.

In the years since *Tinker*, courts have struggled to draw a clear line between student speech that substantially interferes with school operation and speech that, while controversial or inflammatory, remains solidly protected even for students. *Compare Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573–74 (4th Cir. 2011) (holding that the First Amendment was not violated when student was punished for speech on her MySpace page ridiculing another student), *and Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1070–72 (9th Cir. 2013) (holding that the First Amendment was not violated when student was punished for violent content on MySpace page and in instant messages), *with J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 928–31 (3rd Cir. 2011) (*en banc*) (holding that the First Amendment was violated when student was suspended for creating offensive MySpace page about his school principal). As explained below, this Court's long-standing First Amendment standing and ripeness precedent are vital to protecting student speech in light of the *Tinker* standard and the special nature of speech in the school setting.

A. Students are particularly susceptible to the chilling effects of laws and rules that restrict protected speech.

Students are surrounded by authoritarian figures. Their school activities are monitored and often recorded and they can be subjected to serious punishment by school officials—anything less than a 10-day suspension—with little, if any, adjudicative process. *See Goss v. Lopez*, 419 U.S. 565 (1975). These aspects of school life create an atmosphere where many students are reluctant to challenge authority. This, in turn, makes students "particularly vulnerable to having their speech chilled"

by laws that restrict protected speech. Case Comment, *Third Circuit Applies* Tinker *to Off-Campus Student Speech.*—J.S. ex rel. Snyder v. Blue Mountain School District, 125 Harv. L. Rev. 1064, 1070 (2012) (noting that "school discipline by necessity involves relatively informal proceedings, which can be arbitrary and unfair," and that "students may be reluctant to push boundaries when their rights are unclear" and "might also legitimately fear informal reprisals if they seek to challenge school officials in court"); Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 Geo. J.L. & Pub. Pol'y 481, 499–503 (2009) (discussing the enhanced chilling effects of "speech codes" on college campuses); Tova Wolking, *School Administrators as Cyber Censors: Cyber Speech and First Amendment Rights*, 23 Berkeley Tech. L.J. 1507, 1528–29 (2008) (discussing the special circumstances present in the school setting which make the chilling effect of speech restrictions particularly dangerous).

Furthermore, students increasingly communicate and share ideas through the internet and social media, where those ideas can be accessed by millions of people around the world. *See J.S.*, 650 F.3d at 940 (noting the "'everywhere at once' nature of the internet"); *Wynar*, 728 F.3d at 1064 ("students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically..."). Schools and government officials have responded to these changing means of student communication with aggressive and at times dubiously constitutional laws and school rules. *See* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying*, 46 Wake Forest L. Rev. 641, 641–42 (2011) (discussing schools' attempts to address cyberbullying issues).

For example, states across the nation have begun enacting laws aimed at prohibiting the harassment of other students or teachers both in the classroom and on the internet. *See State Cyberstalking and Cyberharassment Laws*, Nat'l Conf. of State Legislatures (last updated Dec. 5, 2013), *available at* http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx (providing a summary chart of state cyberharassment laws). These laws often are exceedingly broad, reaching not just petty schoolhouse bullying but also controversial political and social topics at the heart of the First Amendment. *See, e.g.*, Iowa Code § 280.28 (2007) (defining harassment as "any electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student" including "political party preference" or "political belief"); La. Rev. Stat. Ann. § 17:416.13 (2013) (defining "bullying" as including "[w]ritten, electronic, or verbal communications including but not limited to calling names . . . or spreading untrue rumors"); N.C. Gen. Stat. § 14-458.2 (2012) (imposing criminal penalties on certain online behaviors if done "[w]ith the intent to intimidate or torment a school employee," including the online posting of a school official's photo or the posting of a school official's "personal ... information").

And even in states without such laws, school officials frequently seek to suppress or punish speech by students on important social issues that are viewed as too controversial or offensive. *See* Majeed, *supra*, at 501–03 (discussing the use of speech codes by universities to suppress unfavorable speech and creating a sense of entitlement among students to be free from "offensive" or "disagreeable" speech); Alan Charles Kors & Harvey

A. Silvergate, *The Shadow University: The Betrayal of Liberty on America's Campuses* 5 (1998) (discussing the suppression of disagreeable speech by universities, including through the use of speech codes to prohibit "speech that 'offends'").

The pre-enforcement facial challenge has been an indispensible tool in overturning excessively broad enactments penalizing speech that campus decision-makers subjectively deem inappropriate. *See, e.g., Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 203 (3d Cir. 2001) (entertaining facial challenge brought by students and parent volunteer who asserted that they "feared that they were likely to be punished" and enjoining enforcement of school district "harassment" policy that prohibited, among many other things "derogatory comments" or "negative comments"); *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008) (entertaining facial challenge brought by college student who, while he had not been threatened with discipline under a "harassment" policy that the court ultimately enjoined as unconstitutionally overbroad, asserted that he "felt inhibited in expressing his opinions in class concerning women in combat and women in the military").

Without the ability to bring pre-enforcement, facial challenges to these speech restrictions, many students will simply forgo their First Amendment rights. No matter how strong their beliefs, few students will expose themselves to school discipline—tarnishing their school record and threatening their college and job prospects—in the hope that the legal system might later vindicate them. Instead, students will simply stay silent—resulting in the compelled self-censorship that this Court's precedent

has long condemned. *See Ashcroft*, 542 U.S. at 670–71. The Court should avoid this damaging consequence by reaffirming its traditional, broad view of standing and ripeness in First Amendment cases.

B. Without broad pre-enforcement standing rules, many student speech lawsuits will be mooted before final adjudication.

First Amendment challenges involving student speech also face another unique hurdle: mootness. It is common for students challenging a restriction on school speech to graduate while the lawsuit is pending, thereby mooting the First Amendment claim. *See, e.g., Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007) (students' First Amendment challenge to actions of school became moot when the students graduated because the school "can no longer impinge upon plaintiffs' exercise of freedom of the press"); *Fox v. Board of Trs. of the State Univ. of N.Y.*, 42 F.3d 135, 140 (2d Cir. 1994) ("This court has consistently held that students' declaratory and injunctive claims against the universities that they attend are mooted by the graduation of the students...."); Wolking, *supra*, at 1529 ("A school official acts as both prosecutor and judge when he moves against student expression because the short duration of most sanctions makes the promise of judicial review an empty one.") (internal quotations and alterations omitted).

Without robust pre-enforcement standing and ripeness rules, this mootness problem will make many student speech laws virtually unchallengeable. Indeed, under the Sixth Circuit's view of standing and ripeness, students would need to wait at least until the school

disciplinary process begins—and possibly until that process concludes—before bringing suit. For high school students in particular, this delay would prevent many First Amendment claims from being fully adjudicated before graduation.

The option of a viable pre-enforcement facial challenge is especially important in the school setting because so many students' school experiences are unique, irreplaceable, and insufficiently redressed by money damages alone. For example, New Jersey students successfully brought a facial challenge to enjoin enforcement of an unconstitutionally overbroad school board rule that purported to give the school district authority to remove any student from extracurricular activities for any unlawful behavior anywhere, even off-campus during summer vacation and even in violation of non-criminal municipal codes. *G.D.M. v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist.*, 48 A.3d 378 (N.J. Super. 2012). Because the regulation successfully challenged in *G.D.M.* gave school decisionmakers essentially standardless discretion to punish or not to punish, no student would have been able to surmount the "certainty" hurdle to establish standing applied by the Sixth Circuit below. The only plaintiff with standing under the decision below would be a student actually disqualified from extracurricular participation. It demands too much to say that a student must undertake the life-altering consequences of being a "sacrificial plaintiff"—forfeiting athletic or artistic participation that could be decisive in earning a ticket to college—to overturn a chillingly overbroad policy. And, by the time the student engages in that disfavored speech and ultimately is disqualified from extracurricular school activities, there may not be time

to secure a final adjudication on the First Amendment issue before the case is mooted by graduation, leaving the law intact.

In addition, the ephemeral nature of many school rules renders pre-enforcement challenges all the more necessary. School policies are changed easily and often, allowing school administrators to circumvent legal challenges to those rules. Although the voluntary cessation doctrine should protect against this behavior, this protection is not absolute. *See Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969, at *2 n.1 (W.D. Ohio June 12, 2012) (discussing the voluntary cessation doctrine). Schools can formally adopt revised rules and regulations, *see Sossamon v. Texas*, 131 S. Ct. 1651, 1670 (2011) (Sotomayor, J., dissenting) ("[prison] officials may change the policy while litigation is pending ... The fact of 'voluntary cessation' may allow some of these claims [challenging the policy] to go forward, but many will nonetheless be dismissed as moot..."), or other intervening events, such as the student's graduation, may otherwise moot the issue, *see DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (student's challenge to law school's admission procedures was mooted by fact that student was guaranteed to be permitted to graduate). Further, if the Sixth Circuit's holding were followed, the voluntary cessation doctrine would fail to protect students who were excluded from court in the first place on the basis that the school had "voluntarily" decided not to fully enforce the rule at issue *before* the lawsuit began. *See supra*, at 11 (under the Sixth Circuit's standard, students would need to wait at least until school's disciplinary process is begun before bringing suit).

In sum, this Court's traditional rules governing standing and ripeness in First Amendment cases are necessary to provide meaningful opportunities for students to defend their free speech rights. The Court should reject the Sixth Circuit's holding below and reaffirm that standing and ripeness principles are satisfied in a facial First Amendment challenge if the plaintiffs allege an actual, well-founded fear that the law will be enforced against them and the government refuses to disavow the challenged law.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below.

Respectfully submitted,

FRANK D. LOMONTE
STUDENT PRESS LAW CENTER
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-1904

THOMAS M. CLYDE
KILPATRICK TOWNSEND
& STOCKTON LLP
1100 Peachtree Street NE,
Suite 2800
Atlanta, GA 30309
(404) 815-6500

ADAM H. CHARNES
RICHARD D. DIETZ*
ELIZABETH L. WINTERS
KILPATRICK TOWNSEND
& STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300
rdietz@kilpatricktownsend.com

Attorneys for Amicus Curiae

**Counsel of Record*